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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF KANSAS.

A. M. F. RANDOLPH,
REPORTER.

VOL. XXXV.
CONTAINING CASES DECIDED AT THE JANUARY AND THE JULY
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SEPTEMBER 5, 1888.

[For list of attorneys admitted prior to the above date, see 29 Kas., pp. ix-xvii.]

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All cases decided prior to the session of the court in December, 1886, and not before reported, are contained in this volume.

ERRATA.—Page 25: Line 19 from top, for "1871" read 1881. Page 721: Line 15 from bottom, for "more" read less.

SUPREME COURT,
STATE OF KANSAS.

36 1
43 378
43 396

JANUARY TERM, 1886.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.

HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. WILLIAM A. JOHNSTON, }

THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAIL-
ROAD COMPANY, *et al.*, v. W. M. GOUGH AND J. M.
LINLEY, *Partners as Gough & Linley.*

1. **CASE-MADE; Findings; Review.** Where a case-made shows that all of the evidence offered upon the trial to sustain a particular finding of fact of the trial court is preserved therein, the supreme court can decide whether such finding is sustained by any evidence, although all of the evidence presented upon the trial upon other issues of fact is not embraced in the record.
2. **EARNINGS OF DEBTOR; Exemption; Residence of Debtor.** The earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt under § 490 of the civil code and § 157 of the justices act, from such payment, if it be made to appear that such earnings are necessary for the maintenance of his family, supported wholly or partly by his labor; and as the statute of the state does not restrict the exemption to residents, the courts have no authority to make such restriction; therefore, no distinction is to be made between residents and non-residents.
3. **GARNISHMENT; Non-Resident Debtor.** Where a citizen of this state attempts by a proceeding in garnishment against a foreign railroad corporation to subject to the payment of his claim in the courts of this state the personal earnings of a citizen of another state, which per-

K. C. St. J. & C. B. Rld. Co. v. Gough & Linley.

sonal earnings are by the laws of this state, and also of such other state, exempt from being so applied, the earnings of such debtor are exempt from such process.

4. ——— *Case Distinguished.* The case of *The Burlington & Missouri River Railroad in Nebraska v. T. W. Thompson*, 31 Kas. 180, distinguished.

Error from Atchison District Court.

ON March 7, 1884, W. M. Gough and J. M. Linley, partners as *Gough & Linley*, filed their bill of particulars against *The Kansas City, St. Joseph & Council Bluffs Railroad Company*, alleging that on January 23, 1883, they brought their action before a justice of the peace of Atchison county against Jesse Gaut for \$20, and that in said action upon due proceedings certain money due to said Gaut was garnished in the hands of the railroad company; that on February 3, 1883, judgment was rendered in favor of the plaintiffs against said Gaut, by the justice, for \$20, and costs of suit taxed at \$11.85, of which \$5 were costs of the proceeding against the garnishee in the action; that on February 3, 1883, the railroad company filed its answer as garnishee and disclosed \$20 due by it to said Jesse Gaut; that on February 15, 1883, an order was issued by the justice of the peace to the railroad company to pay the said \$20 into court, to be applied upon the judgment against Gaut; that the order was served on the company, but has never been complied with; that on January 14, 1884, a second order was issued by the justice and served upon the railroad company to pay the money into court, which second order was likewise disobeyed; that the judgment in favor of plaintiffs against the said Gaut is in full force and wholly unpaid. Wherefore, the plaintiffs demanded judgment against the company for the sum of \$20 and interest from February 15, 1883, and costs. Trial had before the justice on April 14, 1884, and judgment rendered in favor of plaintiffs for \$25.94 and costs, taxed at \$5.80. The railroad company appealed the case to the district court. With leave of the court, Jesse Gaut was made a party and filed his answer, to which plaintiffs filed a reply. Trial had July 28, 1884, a jury being

Statement of the Case.

waived by the consent of the parties. The court made the following findings of fact :

"1. The plaintiffs are and for several years last past have been partners in business as physicians and surgeons at Atchison, in Atchison county, Kansas; as such, during the year 1882, they rendered professional services to the family of Jesse Gaut, then residents of Atchison, Kansas, at the request of said Jesse Gaut; but prior to January, 1883, said Jesse Gaut and his family removed from Atchison, Kansas, to St. Joseph, Missouri, where they have ever since lived and resided as their home.

"2. On January 23, 1883, the plaintiffs commenced an action against said Jesse Gaut before R. B. Drury, a justice of the peace of Atchison county, Kansas, to recover the sum of \$20 for said professional services of the plaintiffs, and at the same time they caused proceedings in garnishment to issue to said defendant railroad company as garnishee. On February 3, 1883, said railroad company answered as garnishee, to the effect that said Jesse Gaut, as an employé of the garnishee, had performed services for it ever since January 1, 1883, and had earned \$20 for said services which would become due and payable February 15, 1883, and that said sum was for the last thirty days' wages of said Jesse Gaut as an employé of the garnishee; and at the same time said railroad company filed a verified motion for a discharge as garnishee, and the affidavit of said Jesse Gaut was also then and there filed, asking said wages be declared exempt to him. Neither the answer of the garnishee, the verified motion of the garnishee, nor the affidavit of said Jesse Gaut, showed that such wages or earnings of said Jesse Gaut were necessary for the maintenance or use of a family supported wholly or partly by his labor, and said fact was not in any other manner made to appear.

"On February 10, 1883, said Jesse Gaut appeared by his attorney in said action, who was also the attorney of said railroad company, and a trial was had, which resulted in a judgment in favor of the plaintiffs against said Jesse Gaut for \$20 debt, and \$8 costs. On February 15, 1883, the plaintiffs and said Jesse Gaut and said railroad company appeared, and said verified motion for discharge of garnishee came on to be heard, and the answer of said garnishee and said verified motion and said affidavit of Jesse Gaut, all filed February 3, 1883, as aforesaid; and also the exemption statutes of Missouri were

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presented to the justice, which was all of the evidence produced. And thereupon said justice overruled said motion for discharge of the garnishee and for declaring said money exempt, and made an order for the garnishee to pay said sum of \$20 into the hands of said justice to apply upon said judgment and costs; to which rulings and orders said Jesse Gaut and said railroad company then and there duly excepted. On February 22, 1883, a bill of exceptions was duly allowed to said railroad company as garnishee, and signed, and filed by the justice. On January 14, 1884, said justice made another order for said railroad company as garnishee to pay in said money in satisfaction of said judgment and costs—the total costs to that time being taxed by the justice at \$11.85. No part of said money has ever been paid in by the garnishee, and no part of said judgment or costs has ever been paid, and said judgment remains in full force and unsatisfied.

"3. Up to the time of the garnishment, January 23, 1883, the amount of wages earned by said Jesse Gaut was fully \$20 for January, but at the end of the month his wages had amounted to \$43.20, but the same was not payable until February 15, 1883. Before the time for answer of the garnishee, said Jesse Gaut notified said garnishee that he claimed said wages of \$43.20 as exempt.

"4. Said railroad company as garnishee instituted proceedings in error in this court to reverse the order of the justice of the peace requiring the garnishee to pay said sum of \$20 into the hands of said justice to apply on said judgment, but afterward said proceedings were dismissed by order of this court. No proceedings in error were ever instituted by said Jesse Gaut, and he supposed, until about Christmas-time, 1883, that said money had been so paid in accordance with said order of the justice of the peace. Said railroad company retained \$20 out of the January earnings of the said Jesse Gaut, and paid him the balance; after this action was commenced said railroad company also retained \$5 more out of his subsequent earnings, but did not explain to him and he did not know the reason for so doing. After the order of the justice of the peace was made, said Jesse Gaut did not desire any further litigation, but was willing that said sum of \$20 should be applied toward the satisfaction of said judgment, and the defense of this action by said railroad company was made without the knowledge of said Jesse Gaut until about June, 1884, and it was at the solicitation of said railroad company that he consented to be made a party to this action in this court.

Opinion of the Court.

"5. On the trial of this action, the facts stated in conclusion of fact No. 1 were made to appear, and also the further facts that the plaintiffs' claim was for professional services as physicians; that the \$20 garnished in said former action was for earnings of said Jesse Gaut for his personal services for said railroad company within less than three months next preceding the commencement of said garnishment proceedings, and that such earnings were and are necessary for the maintenance and use of the family of said Jesse Gaut, who were and are supported wholly by his labor."

Thereon the court made the following conclusion of law:

"The plaintiffs are entitled to recover of the Kansas City, St. Joseph & Council Bluffs Railroad Company, defendant, the sum of \$20, with interest thereon from February 15, 1883, (\$2.03,) amounting to \$22.03, and costs of suit."

Judgment having been rendered in favor of the plaintiffs and against the defendants for \$22.03, and all costs, the defendants excepted thereto, and bring the case here.

Jackson & Royse, for plaintiffs in error.

Hudson & Tafts, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: Two questions are presented in this case: First, are the findings of fact supported by the evidence? Second, are the personal earnings of Jesse Gaut, due to him from the Kansas City, St. Joseph & Council Bluffs Railroad Company, exempt from the payment of the judgment recovered against him by Gough & Linley? The disputed finding of fact is as follows:

"After the order of the justice of the peace of February 15, 1883, overruling the motion for the discharge of the garnishee and denying the exemption, said Jesse Gaut did not desire any further litigation, but was willing that said sum of \$20 should be applied toward the satisfaction of the judgment."

The only evidence in the record that we can find tending in any way to support this conclusion of fact, is as follows: Jesse Gaut testified:

"I owe Gough & Linley, who are physicians in Atchison,

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for attendance upon my wife; have wanted and intended to pay them what I owe them, but my wife has been weakly and it has cost me my wages to live and support my wife and child; the railroad company first notified me that it had been garnished for \$20 on January 23, 1883; they kept that amount out of my wages and paid me the balance due; after that, and along in January, 1884, I was notified that the company was garnished again for it, but after learning it was garnished on the same old case, they paid me all that was due, excepting \$25 which was due me for my personal earnings at that time."

On cross-examination he further testified:

"I don't know how many trips I made, or how much I made in January, 1883, before the 23d of the month; the railroad company kept back \$20 of my January wages for 1883, and told me I was garnished again in January, 1884, and kept back \$5 more. I supposed the \$20 had been paid to Gough & Linley until after the other money was kept back; I wrote a letter to Dr. Gough after the \$5 was kept back; I don't think I said I was willing to have that debt paid out of the money, and have never signified my willingness to pay the debt out of this money; I wrote the letter to Dr. Gough about last March; didn't write that I wanted it [the debt] paid, and supposed it had been; I wrote that they had garnished me once before for that debt, and wanted to know what they garnished my wages again for. When I was notified of the first garnishment, I went to the office of John Taylor, a justice of the peace in St. Joseph, and told him that I had been garnished, and stated the facts, and a young man in the office wrote a notice to the railroad company that I claimed all the earnings due me as exempt from execution or attachment. I signed and swore to it, and then delivered it to Mr. Carter at the superintendent's office of the railroad company."

Dr. W. M. Gough testified as follows:

"I received a letter about Christmas from Jesse Gaut; it is lost; I think he said in that letter that \$20 or \$25 more had been kept out; I think he said he intended to pay the debt, and that it had been paid, but would not pay it twice; I never got anything on this debt; he never denied owing the debt to me; he complained that his wages were garnished twice on the debt; I cannot recollect exactly what was in the letter; I have stated the substance as I remember it."

Opinion of the Court.

It further appears from the record, that Gough & Linley commenced their action against Jesse Gaut and garnished the wages due him from the railroad company on January 23, 1883; on the same day, he served a written notice upon the railroad company, signed and sworn to by him, claiming all the wages due to him as exempt from execution or attachment; then, on February 3, 1883, the railroad company answered as garnishee that the moneys due Gaut were his wages as an employé, and exempt, and at the same time the affidavit of Gaut was filed before the justice asking his wages to be declared exempt to him. On February 10, 1883, Gaut appeared by his attorney to defend the action, in which a judgment was rendered against him. On February 15, 1883, Jesse Gaut, and also the railroad company, appeared before the justice and presented the statutes of Missouri, claiming that the wages garnished were exempt. After the order of February 15, 1883, was made for the garnishee to pay the \$20 into the hands of the justice to apply upon the judgment and costs, nothing further was done toward the enforcement of this order until January 14, 1884, when the justice made another order for the railroad company, as garnishee, to pay the money in satisfaction of the judgment and costs. The railroad company refusing to comply with the order, the plaintiffs filed their bill of particulars on March 7, 1884, asking judgment in their favor and against the defendants for the \$20 garnished, with interest from February 15, 1883, and also for all costs. The railroad company filed its answer on April 12, 1884; judgment was rendered against the company on April 14, 1884, for \$25.94 and costs, taxed at \$5.80; the case was then appealed by the railroad company to the district court; on June 24, 1884, Jesse Gaut presented his motion for leave to be made a defendant and to file his answer; this was granted, and his answer filed; ever since, he has continued to be vigilant in claiming his exemption.

Upon the oral evidence and the records before the justice of the peace and the district court, we do not think that there is any evidence to support the finding that Gaut did not desire

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- any further litigation, or was willing that the sum of \$20 should be applied in satisfaction of the judgment rendered before the justice of the peace. The most that can be said is, that he supposed when the railroad company retained \$20 the company had paid it to Gough & Linley, but when he found this was not the case, he was anxious to claim all his wages as exempt.

“Until the right of exemption is waived, or lost by some unequivocal act or declaration of the debtor, it remains with him, and any of his property which is included within the terms of the statute is beyond the reach of the officer and his process.” (*Rice v. Nolan*, 33 Kas. 28.)

Counsel for plaintiffs below suggest that as all the evidence is not preserved, the findings of the court are conclusive. The record, however, shows that upon the disputed findings of fact all of the evidence that was offered is embraced therein.

It is the claim of defendants below that the judgment of the district court was rendered upon the finding that Gaut was not a resident of this state at the time of the garnishment. If such was the ruling it was erroneous.

“Under the statute, the earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt from such payment, if it be made to appear by the debtor’s affidavit, or otherwise, that such earnings are necessary for the use of his family, supported wholly or partially by his labor; and no distinction is made by the statute between residents and non-residents, or between debts created in Kansas and debts created elsewhere; and the weight of authority seems to be that where the statutes do not make any distinctions, that no such distinctions exist; that if the statutes do not restrict the exemption of property for the payment of debts to residents, or to some other particular class of persons, the courts have no authority to make such restriction, and the statute will apply to all classes, non-residents as well as residents.” (*Mo. Pac. Rly. Co. v. Maltby*, 34 Kas. 130; *Zimmerman v. Franke*, 34 id. 650.)

1. Finding; evidence; review.
2. Earnings of debtor; exemption; residence of debtor.

3. Garnishment; non-resident debtor.

Opinion of the Court.

In *B. & M. Rld. Co. v. Thompson*, 31 Kas. 180, the case was discussed and decided, whether the exemption laws of Nebraska have force in this state, the trial judge⁴ remarking, that "the showing was insufficient to sustain the exemption under the laws of Kansas," and in the conclusion of his opinion, said: "The garnishee has not made out a case of exemption for its creditor here under our statute which governs us, and which we must follow in preference to the Nebraska statute." If it be claimed that the judgment rests upon the adjudication of the justice refusing to set aside the garnishment and discharge the fund as exempt, it is sufficient to say that such an order is not conclusive. Such a ruling is neither a judgment nor a final order, and is not reviewable by proceedings in error. Neither the railroad company nor Gaut could successfully have instituted proceedings in error in the district court. (*Zimmerman v. Franke*, supra; *Miller v. Noyes*, 34 Kas. 13; *Board of Education v. Scoville*, 13 id. 32; *Phelps v. Railroad Co.*, 28 id. 169; *Mull v. Jones*, 33 id. 112.)

We think there is nothing whatever in the suggestion that Gaut was not properly a party to this action in the district court, or that the exemption had been lost by lapse of time. The last finding of the court shows that the money garnished was for the earnings of Gaut for his personal services for the railroad company within less than three months next preceding the garnishment proceeding, and that the earnings were and are necessary for the maintenance and use of his family, which was and is supported wholly by his labor.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

JOHN S. MANN v. J. D. BURT, *et al.*

1. **RAILROAD CONSTRUCTION; Bond of Contractor.** Where a railroad company takes from the contractor engaged in the construction of its road a good and sufficient bond, such as is required by chapter 136 of the Laws of 1872, it cannot be held liable for the debts due from the contractor for the labor and material which go into the building of such road. The filing of the bond in the office of the register of deeds is not a condition precedent to immunity from such liability.
2. **TEAMSTER, a Laborer.** A teamster employed by a contractor in the construction of a railroad is a laborer within the meaning in which that term is used in the statute above mentioned.
3. **RAILROAD COMPANY, When Not Liable.** The railroad company cannot be held liable for the debts due from the contractor for the labor of teams in constructing the road, whether such labor was used in connection with the services of the person furnishing the same, or not.
4. **TEAMSTER AND TEAM—Company Not Chargeable.** Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable.

Error from Cowley District Court.

ACTION brought in the district court of Cowley county under the provisions of chapter 136 of the Laws of 1872, in which the plaintiff alleged that the defendant company had failed to take the bond from the contractor who constructed a portion of its road, and he asked that the company be held liable for certain labor performed for the contractor upon the road, and for which he had not paid. The answer of the railroad company was a general denial, to which were added the following defenses:

"2. And for a second and further defense to the action of the plaintiff, this defendant avers, that on the 20th day of August, 1879, it entered into a contract with the defendant, Bernard Corrigan, for the construction of its road-bed through the county of Cowley, state of Kansas, and thereafter required and took from said defendant, Bernard Corrigan, the bond in such cases required and prescribed by law; a true copy of

Opinion of the Court.

which said bond is hereto attached, marked 'Exhibit A,' and made a part of this, the second cause of defense in this answer contained, which said bond and the security thereon signed and therein named, the defendant avers was at the date thereof, and ever since has been and now is, good and sufficient in every particular." (The exhibit attached was a contractor's bond in the usual form.)

"3. And for a third and further defense to the action of the plaintiff, this defendant avers that if any contract ever existed between the defendant, Bernard Corrigan, and the J. D. Burt in the petition of the plaintiff mentioned, in form and substance, as in and by said petition set forth and alleged, and if the several persons mentioned in said petition ever were employed or performed labor in the construction of this defendant's line of railroad as in said petition alleged, said persons, and each and all thereof, were employed by said Burt in the capacity of foreman, clerks, time-keepers and teamsters in connection with teams of horses or mules owned or controlled by them respectively, and under such employment and in pursuance thereto performed any and all such labor as such foreman, clerks, time-keepers and teamsters, owning or controlling such teams respectively, and not otherwise, and at and for an agreed price per day for the services so rendered, which price, so far as it related to said teamsters and teams, was based upon and comprised the value of the joint labor of said teamsters and their said team or teams per day, or by the job, as the case might be, and not otherwise."

The plaintiff demurred to the second and third defenses, which demurrer was heard by the court at the January Term, 1884, and overruled. This ruling is assigned for error here.

Jennings & Troup, for plaintiff in error.

W. P. Hackney, for defendant in error the Southern Kansas Railroad Company.

The opinion of the court was delivered by

JOHNSTON, J.: The question raised by the demurrer to the second defense is, upon what contingency does the liability of the railroad company for the debts of the contractor who constructed its road depend? It is alleged that the company took from the contractor a good and sufficient bond—such as is

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provided for in chapter 136 of the Laws of 1872,'but it is not averred that the bond was filed by the railroad company in the office of the register of deeds of the county where the work was done. The omission of this averment is the ground of demurrer relied upon by defendant. On the part of the plaintiff, it is urged that before the railroad company will be exempt from liability for the debts of the contractor it must not only have taken a bond, but it must also have filed the same in the office of the register of deeds; while the claim of the company is, that to escape such liability, it was only required to take a good and sufficient bond; and this it alleges it had done. We agree with the defendant. The statute is so written. Its terms are plain and unmistakable. The language fixing the liability of the railroad company is, "and if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor." (Laws of 1872, ch. 136, § 1.) Thus it will be seen that the filing of the bond is not a condition precedent to be performed by the railroad company before it can claim immunity from the payment of the debts mentioned in the statute. It is true that in a preceding part of the statute it is made the duty of the company to file the bond in a public office, and we might agree with the plaintiff that it would add much to the convenience of persons who desire to avail themselves of the benefit of the bond, to have required it to be filed before the company would be freed from liability; but when the legislature came to fix the condition upon which the liability of the company should arise, it provided that it should be liable if it failed to *take* a bond, and not if it failed to take and *file* the same; and the inconvenience occasioned, or the impolicy of the statute, are not considerations for the court. We are reminded that the statute should be construed so as to advance rather than defeat the remedy intended by the legislature; but we must also remember that it is a statute imposing an additional liability under which it is sought to make the company responsible for a debt which it never contracted, and we have

1. Bond of contractor; filing.

Opinion of the Court.

before decided that "such a statute should never be extended beyond the fair import of its terms." (*M. K. & T. Rly. Co. v. Baker*, 14 Kas. 563.) The failure to require the bond to be filed, it is true, is an inconvenience, but it does not thwart the purpose or defeat the remedy intended by the legislature. The debtors are secured either by the bond or by the company. If a good and sufficient bond has been taken, the responsibility of the company ceases, and that it will conceal the bond, or the fact that it had been taken, from the persons interested, is an unlikely supposition, as it would be against its own interest, and would probably tend to subject it to embarrassment and litigation. If for any reason the company should fail to file the bond, or upon request to produce or make known what it was, the parties interested could, by taking the proper legal steps, obtain copies thereof, or compel its production. However, the legislature has expressly stated in language not open for interpretation, the conditions upon which the liability of the company depends, and the courts cannot add to them. We think the demurrer was rightly overruled.

In the third cause of defense it is alleged that the persons for whose services the action was brought were employed in the capacity of foreman, clerks, time-keepers, and teamsters, in connection with their teams. It is settled by a decision of this court, that persons in the employ of a contractor as foreman, clerks, and time-keepers, are not laborers in the sense in which that term is used in the statute, and therefore not within its protection. (*M. K. & T. Rly. Co. v. Baker*, supra.) None of the terms employed in the statute are broad enough to include persons who merely furnish one or more teams to work for the contractor. The persons who fall within its protection are enumerated, and are "laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind." The railroad company, therefore, cannot be charged with such labor, even though it be given in connection with the personal services of the owner of such teams. (*Balch v. Railroad Co.*, 46 N. Y. 521; *Groves v. Railroad Co.*, 57 Mo. 304.) It is different, however, regarding the personal

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services of the teamster. The work performed by him in driving the team, handling a plow, and loading and unloading scrapers and wagons, is such as to constitute him a laborer, within the meaning of that term as used in the statute. The principal part of the work performed by him is ordinary manual labor, and if the compensation for his work is distinguishable from that performed by the team which he drives, he may, where no bond has been taken, charge the railroad company for the same. In this case, however, it is alleged that the services performed by the teamster and his team were for an agreed price per day for the joint labor of such teamster and team. He was not employed separately. The part which was performed by him was mingled and confused with that performed by the team, and the indebtedness for the same constituted a single demand. There is therefore no mode of ascertaining the amount due from the contractor for the personal services of the teamster. In a case somewhat similar to this it is said:

2. Teamster, a laborer.

3. Railroad company, when not liable.

"Another difficulty in the judgment as it stands is, that it makes a new agreement between the plaintiff and the railroad contractor. The foundation of the liability of the corporation is the debt due to the laborer from the contractor. In this case the contract was entire for the labor of the plaintiff, his man, and two teams; the debt is also entire, and arises out of the performance of that contract. Now it appears to me the defendants cannot be made liable for a part of the services when confessedly they are not for another part, the whole being performed under one entire agreement. The true obligation of the contractor was to pay for the whole as a unit, and I do not see how this can be split into two parts for the purpose of enforcing one of them against the company. The recovery against the corporation must be according to the agreement of the contractor, and his obligation arising under it to the laborer. If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employer alone upon his contract."

(*Atcherson v. Troy & Boston Rld. Co.*, 6 Abb. Pr. Rep. 329. See also *Balch v. Railroad Co.*, supra.)

Noble v. Bowman.

If, upon the further trial of this cause, it is found that the agreement between the teamsters and the contractor was not an entirety, and did not constitute a single demand, but that the personal services of the teamsters are distinguishable from the labor performed by the teams, the plaintiff may recover for such personal services, provided the railroad company is liable at all. The allegations of the answer, however, make the debt due from the contractor for the teamster and his team a single demand, and therefore the ruling of the court upon the demurrer was correct.

4. Teamster
and team;
company not
chargeable.

The judgment of the district court will be affirmed.

All the Justices concurring.

LOUIS NOBLE V. C. S. BOWMAN, *et al.*

GARNISHMENT; *Obligation; Sureties, When Liable.* M. owed \$165 either to A. or to N., and O., in an action against A., claiming that the debt was due to A., garnished M., and the court ordered M. to pay the money into court. N., however, claimed the money as the creditor of M., and M., not knowing to whom he was liable, and wishing to leave the state, entered into an agreement with A. and N., and B. and others, that he should pay the money to B., and that B. should retain the same until the question should be finally decided by a judicial determination whether the money belonged to N., or to A., or to O., and that after such determination B. should pay the money to whom it belonged; and the money was in fact paid to B., and he as principal, and others as sureties, executed to M. and A. and N. an obligation to secure the faithful fulfillment of the agreement; and nothing has transpired since to render B. and his sureties liable to an action on the obligation: *Held*, In an action by N. against the obligors on their obligation, that they are not liable; or, in other words, that the obligors are not liable to N. until it is at least settled that the garnishee is not liable in the garnishment proceedings.

Error from Harvey District Court.

THIS was an action brought in the district court of Harvey county, on August 26, 1881, by Sarah A. Noble against C. S.

Noble v. Bowman.

Bowman, James H. Anderson, William H. Bean and B. C. Arnold, upon the following instrument in writing, to wit:

"STATE OF KANSAS, HARVEY COUNTY, ss.: Know all men by these presents, that we, the undersigned, are held and firmly bound unto A. B. Noble, Sarah A. Noble and M. A. Myers in the sum of two hundred dollars. The condition of this obligation is, that whereas in the case of *O. J. M. Borden v. A. B. Noble*, on the docket now in the possession of T. C. Cutler, J. P., of Newton township, in said county and state, the said M. A. Myers was garnished, and ordered by said justice court to pay into said court on or before September 15, 1879, the sum of one hundred and sixty-five dollars; and whereas the said Sarah A. Noble claims to be the owner of said money, and intends to institute proceedings for a final judicial determination of her claim; and whereas the said M. A. Myers has delivered to C. S. Bowman said sum of \$165, to be by him held until such final adjudication is had, and until September 15, 1879, and then pay the same over to the person or authority adjudged to be entitled thereto; and whereas the said C. S. Bowman agrees to pay to Sarah A. Noble annually 12 per cent. interest thereon: now, therefore, if all these things herein required of the said C. S. Bowman are fully done and performed, then the above obligation to be void, otherwise it shall remain in full force and effect.

"Executed in duplicate this 27th day of October, 1877.

C. S. BOWMAN. JAS. H. ANDERSON.
WM. H. BEAN. B. C. ARNOLD."

The plaintiff, after giving a copy of the foregoing instrument in writing in her petition, alleged, among other things, that she had instituted legal proceedings in the district court of Harvey county for the purpose of having the question of the ownership of the aforesaid money determined as between herself and the said O. J. M. Borden, and that in such proceedings it had finally been determined that the money belonged to her and that she was entitled to the same; and that afterward she demanded the same of the defendants, but that they refused to pay it to her or any part thereof. The defendants answered, admitting the execution of the foregoing instrument and the prosecution of the aforesaid legal proceedings between the plaintiff and Borden, but setting up in sub-

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stance that while the question of the ownership of said money had, in said legal proceedings and in the district court, been determined in favor of the plaintiff, yet that the judgment and decision of the district court had been reversed in the supreme court, and that it was held and decided by the supreme court that the question whether the plaintiff was entitled to said money, or not, could not be determined in that action, and that since the decision of the supreme court the defendants had paid over the money in controversy to Borden. Before the trial of the present action, the subject-matter of the controversy was assigned by Sarah A. Noble to Louis Noble, and he became the plaintiff in the action. Afterward, the case was tried by the court without a jury, and the court made a general finding in favor of the defendants and against the plaintiff, and rendered judgment accordingly. To reverse this judgment, the plaintiff brings the case to this court.

Greene & Shaver, for plaintiff in error.

Bowman & Bucher, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: The motion of the defendants in error to dismiss this petition in error must be overruled, and the judgment of the court below must be affirmed. We shall not discuss the motion, however, but will pass at once to the merits of the case.

It appears that M. A. Myers owed \$165 either to A. B. Noble or to Sarah A. Noble, and to which he owed this sum is the main question involved in this case. The question arises as follows: O. J. M. Borden commenced an action against A. B. Noble before a justice of the peace of Harvey county, and garnished Myers as the debtor of A. B. Noble; and Myers answered, and was ordered by the justice of the peace to pay the aforesaid \$165 into the justice's court as a debt due from Myers to A. B. Noble. Mrs. Noble, however, claims this money; and Myers, not knowing to whom it belonged, or to whom he should pay it, or to whom he was bound, and

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wishing to leave the state, entered into an agreement with the Nobles and the defendants in this action that he should pay it to C. S. Bowman, and that Bowman should retain it until the question should be finally decided by a judicial determination whether the money belonged to Mrs. Noble, or to A. B. Noble, or to O. J. M. Borden, the plaintiff in the garnishment proceedings. The money was in fact paid to Bowman, and he, as principal, and James H. Anderson, William H. Bean and B. C. Arnold as sureties, executed to Myers and the Nobles the obligation sued on in this action, to insure the faithful fulfillment of the foregoing agreement. Borden was not a party to this agreement or to the obligation aforesaid, nor did he agree to release Myers as garnishee, or to look to the fund in Bowman's hands as security for his claim against A. B. Noble; and of course unless Borden's claim against A. B. Noble has been satisfied, or Myers in some way released by Borden, Myers is still liable to Borden as garnishee, if he ever was so liable; and nothing has been shown in this case that would in any manner have the slightest tendency to release Myers. It is true, the defendants offered to prove that Bowman paid the money into the justice's court for Borden, but the plaintiff objected, and the evidence was excluded by the court. It is also true that the plaintiff commenced an action in the district court of Harvey county against Borden and others, to have the question determined as to whom the fund in Bowman's hand belonged or should be paid, and the district court decided that it belonged to Mrs. Noble; but it is also admitted that that case was brought to the supreme court, and that the judgment of the district court was reversed. (*Borden v. Noble*, 26 Kas. 599.) And what has become of that case since it was decided in the supreme court, we are not informed, and no party now makes any claim under it. And there is no claim now that any final adjudication with regard to the money in Bowman's hands or with regard to the liability of Myers to Borden, or to A. B. Noble, or to Mrs. Noble, for that amount, has ever been had. Therefore, so far as anything is shown in this case, Bowman

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still has the possession of the aforesaid money; Myers is still liable to Borden as garnishee for that amount, if he ever was so liable; and the status of the parties and their relations toward each other still remain precisely the same as they were on the 27th day of October, 1877, when the obligation sued on in this action was first executed, and on the day when the fund now in litigation was first paid by Myers to Bowman. We therefore think it follows that the rights and interests of the parties still remain the same as they were on the first day the obligation sued on in this action was executed by the present defendants, as obligors, to Myers and A. B. Noble and Mrs. Noble, as obligees, to secure the payment of the fund deposited by Myers with Bowman, to the person to whom it might finally be decided to belong; and Myers certainly has as much right to claim that the fund shall be applied in such a manner as best to protect his rights and interests as either A. B. Noble or Mrs. Noble has to claim that the money shall be paid to him or her. And so long as Myers is liable to Borden as garnishee, and presumably he is still liable, this fund which he placed in Bowman's hands should not be paid to either A. B. Noble or Mrs. Noble until it shall be finally settled or determined in some manner that Myers is no longer bound to pay the same to Borden or to pay the same into the justice's court for the benefit of Borden. Such a settlement or determination has never yet been had. Indeed, as before stated, nothing has transpired since the execution of the obligation and since the payment of the money by Myers to Bowman that would render the present defendants, the obligors mentioned in the bond sued on in this action, liable; and if they are now liable for any reason, then they were liable for the same reason at the very first instant when they executed the bond. Now it cannot be true that they intended to execute a bond which would render them liable to be sued just as soon as it was executed. It can scarcely be supposed that they intended by signing the bond to give Mrs. Noble an immediate cause of action against them upon the bond for the \$165; but if

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they are now liable upon the facts of this case, then they must have been liable as soon as they executed the bond, which cannot be the case. Before the defendants can be held liable on the bond, it must be determined in some manner conclusively as against Borden and in favor of Myers, that Myers has never been liable in the garnishment proceedings of Borden, or that he has been released therefrom. Such a determination or release, judicial or otherwise, has never been had. And the decision in this present action could not amount to such a determination or release, in whose-soever favor it might be rendered, for in order that the decision in this present action should be such a determination or release, all the obligees of the bond, as well as Borden, should be parties to the action. None of them can be bound by the decision or the judgment rendered in this action unless they have been made parties thereto, which has not been done. Neither Myers, nor A. B. Noble, nor Borden, has been made a party to this action. So far as is shown in this case, if Bowman should be required to pay the amount in controversy to Mrs. Noble, or to her assignee, Louis Noble, the present plaintiff in this action, the defendants might again be required to pay the amount to one of the other obligees of the bond. They might, indeed, have to pay it to Myers, if Myers should finally be held to be liable in the garnishment proceedings. We shall assume that Borden could not maintain an action on the bond for the recovery of the fund in Bowman's hands, for he was not a party to the bond, and had nothing to do with it; but still Borden may maintain an action against Myers as garnishee for the amount, and then Myers, as one of the obligees of the bond, might maintain an action against the defendants for the same. In our opinion, so long as Myers is liable as garnishee to Borden, no cause of action can accrue in favor of either A. B. Noble or Mrs. Noble, or her assignee, Louis Noble, for the fund mentioned in the bond.

We think the judgment of the court below is correct, and it will be affirmed.

All the Justices concurring.

THE CITY OF WYANDOTTE V. THOMAS CORRIGAN.

1. STREET RAILROAD—*Regulation by City; License Tax.* A city granted to a corporation a franchise to construct and operate a street railroad within its limits, and in the ordinance conferring the grant provided how and when it should be constructed, and the manner in which it should be maintained. *Held,* That the grant thus made will not exempt the corporation from reasonable regulation by the city in the operation of the road, nor will it prevent the city from levying and collecting a license tax thereon.
2. GRANTS TO CORPORATIONS; *Strict Construction.* Grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public.
3. CORPORATION; *Agent Violating City Ordinance.* An agent or employé of such corporation who knowingly operates or assists in operating a street railway when the license tax imposed on such business is unpaid, will be liable to prosecution and punishment, as prescribed by the ordinance.

Appeal from Wyandotte District Court.

PROSECUTION for the violation of ordinance No. 448, of the city of Wyandotte. From a conviction in the police court of the city, the defendant appealed to the district court, and was there tried and again convicted. The ordinance for the violation of which the defendant was prosecuted was entitled: "An ordinance regulating the collection of a license tax on the corporations herein named." Section 1 of the ordinance provided:

"That it shall be unlawful for any person or persons, firm or corporation, to transact, engage in, or pursue any business or vocation, or to do any act, or make any exhibition hereinafter named, described or specified, in the city of Wyandotte, without first having paid such sum or sums, and obtained a license so to do, as hereinafter provided or required."

Section 2 provided that there should be charged and collected for every license granted for any business or occupation, or object herein named and specified, as follows: . . . After enumerating the sums to be charged and collected for other business occupations and objects, section 26 provided

35	21
40	654
36	21
49	608
35	21
52	635
35	21
56	360
35	21
50	417

City of Wyandotte v. Corrigan.

that there should be charged and collected "upon a street railway company's license one hundred dollars per year."

Section 36 of the ordinance provided that—

"Whoever shall violate or neglect or refuse to conform to or to observe the preceding provisions of this ordinance, and any or either of them, by carrying on or engaging in any business, occupation or profession named in this ordinance, without having first taken out a license, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not to exceed one hundred dollars."

In 1871 the mayor and council of the city of Wyandotte enacted an ordinance authorizing the Kansas City and Wyandotte Street Railway Company to construct and operate a street railway upon certain streets and avenues within the city. This ordinance was amended in 1881 by ordinance No. 330. Section 3 of the amended ordinance provided:

"The said street railway company shall construct a second or double track along and upon such parts of the said streets and avenues as they now are operating their road upon, and shall construct said track alongside of the one now laid, and upon the side and in the manner that shall be designated by the city engineer; the said track to be laid and completed on or before, and said road shall be maintained and operated as a double-track road from and after, the first day of July, 1881; all of said new track to be laid with flat rails so as not to interfere with public travel, and said company to keep said track of said road up to the established grade of said streets, and to keep the same in good repair. Also, the space occupied by its track and the space between the tracks to be four feet in width.

"SEC. 4. The said railway company shall, within thirty days after the passage and approval of this ordinance, make such running arrangements with the Jackson County Horse Railroad Company of Kansas City, Missouri, as to run all of the cars of the Kansas City & Wyandotte Railway Company through without change from the western terminus of the said road in the city of Wyandotte to the public square in the City of Kansas, Missouri, making a through line of said roads, on which through line there shall be at all reasonable hours and times run at least twelve cars.

"SEC. 5. The said railway company may collect fare as fol-

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lows: For every person over the age of five years riding in said cars, five cents and no more, for one trip over said road or any part thereof between the state line and any point in the city of Wyandotte to which said road shall run, or *vice versa*.

"SEC. 6. The said railway company shall be entitled to the rights, privileges and benefits of this ordinance for the full term and period of twenty-one years from and after this ordinance takes effect."

The cause was tried in the district court upon an agreed statement of facts, which is as follows:

"It is agreed by the parties hereto, that said railroad is operated only on the streets specified; that Thomas Corrigan, the defendant, on or about the 22d day of March, 1884, was the general manager of a street railway company running and operating cars in the city of Wyandotte under ordinance No. 330, and the ordinance of which the same was amendatory; and said defendant, on said day, did run and operate said cars and said street railway, without first having procured any license therefor, or paid any license tax thereon, as provided by ordinance No. 448. All other questions are waived."

The trial resulted in a conviction of the defendant, and on August 9, 1884, he was adjudged to pay a fine of twenty-five dollars, with the costs of prosecution, from which judgment he appeals.

John C. Tarsney, for appellant.

Henry McGrew, city attorney, for appellee.

The opinion of the court was delivered by

JOHNSTON, J.: The mayor and council of the city of Wyandotte, by an ordinance adopted in 1871, which was amended in 1881, authorized the Kansas City & Wyandotte Street Railway Company, of which the appellant is general manager, to construct and operate a street railway upon and along certain streets and avenues within the city. In the ordinances granting the franchise, it was provided that it should be constructed and maintained as a double-track railway; that the tracks should be laid flush with the streets and with flat rails, so as not to interfere with public travel, and should be kept in

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good repair; also that the company should operate its railway in connection with one in Missouri, so that cars should be run over both lines without change, making a through line on which cars should be run at all reasonable hours and times, and further providing a maximum fare which should be charged for transportation over the company's line. From the record presented in this case, it does not appear that any other duties or obligations were imposed upon the company by the ordinance granting the franchise, nor does it appear that it contained any express exemption from municipal regulation or control, nor from the liability of others doing business within the city. The defendant urges that the granting of the franchise and its acceptance by the company constituted a contract within the protection of the federal constitution, which could not be impaired by any subsequent legislation of the city without the assent of the company; and he contends that no other or different conditions or burdens could be imposed than those mentioned in the ordinances, and therefore that the license tax could not be enforced against the company, or any of its agents. It may be conceded that the grant and its acceptance constitute a contract the obligation of which comes within the protection invoked; but the extent of the contract is not what is claimed. It does not involve any conditions or exemptions beyond those which are clearly expressed or necessarily implied. It is well settled that grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public. It has been said in respect to grants of special privileges, that—

2. Grants to corporations, strictly construed.

“Nothing is to be taken as conceded, but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown; silence is negative, and doubt is fatal to the claim.” (*Fertilizing Co. v. Hyde Park*, 97 U. S. 659.)

The application of this rule will overthrow the contention

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of the appellant. As has been seen, the ordinance conferring the grant provided only for the manner of constructing, maintaining and operating the road. Nothing in the letter or spirit of the ordinance indicates any intention on the part of the city to relinquish municipal regulation and control of the company, if, indeed, it can be done, nor to relieve it from taxation, or the ordinary burdens to which other corporations and natural persons within the city are subject. The company must be held to have taken the franchise knowing that the business of operating the road must be conducted under such reasonable rules and regulations as the municipality might impose, and subject to its share of the burdens incident to the conduct of the municipal government. The requirements mentioned in the ordinance do not embrace, and are not in any sense inconsistent with, the one now made, and of which the appellant complains. Express authority is conferred upon cities of the second class to levy and collect a license tax upon the business of operating a street railroad, (Laws of 1871, ch. 40, § 3,) and the validity of such legislation has been considered and sustained. (*City of Newton v. Atchison*, 31 Kas. 151.)

We have examined the authorities cited by plaintiff in error, but in them we find nothing in conflict with the conclusion which we have reached. There has been considerable discussion in regard to whether the imposition of the license tax is an exercise of the police power, or of the power of taxation, but this is a matter of indifference in this case, as it is manifest from the contract made that it was not intended by the parties that either should be bargained away or surrendered. We conclude, then, that the conditions stated in the charter, providing how and when the road shall be constructed, and the manner in which it shall be maintained and operated, will not exempt the company from reasonable regulation in other respects, or from bearing its share of the public burdens. (*San José v. S. J. & S. C. Rld. Co.* 53 Cal. 475; *Frankford & Co. Rld. Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 id. 445; *City of St. Louis v. Manufacturers' Sav-*

1. Street railroad;
regulation by
city.

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ings Bank, 49 Mo. 574; *City of St. Louis v. Mo. R. Co.*, 13 Mo. App. 524; *Wiggins Ferry Co. v. E. St. Louis*, 107 U. S. 365; *Union Passenger Rly. Co. v. City of Philadelphia*, 83 Pa. St. 429.)

The appellant further contends that he cannot be held criminally responsible for the failure of the company to pay the license tax, claiming that the ordinance did not impose the duty of paying such tax upon any officer, servant or employé of the company. This contention has no ground upon which to rest. A corporation can only act through its agents, and by the agreed facts it is shown that the appellant is the general manager of the company, and that he was actually engaged in running cars and operating a street railway at the time charged when the license tax provided by the ordinance was unpaid. The ordinance makes it unlawful for any *person* or firm, as

3. Agent of corporation to procure license tax.

well as a corporation, to engage in any of the occupations or classes of business mentioned, without procuring a license and paying the tax, and provides further that *whoever* shall engage in such business in violation of such ordinance shall be convicted and punished. It is immaterial whether the appellant was acting for himself or for the company. He was engaged in the business of operating a street railway within the city while the tax was unpaid, and must therefore suffer the penalty.

The judgment of the district court will be affirmed.

All the Justices concurring.

H. H. WARNER V. M. A. THOMPSON.

35	27
55	680

1. *CONTRACT—Construction by Court.* Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court.
2. *CONTRACT—Party Responsible for Breach.* Where the agent of W. accepts an order from T. to sell to T. a safe in the possession and under the control of L., and the order provides that L. shall deliver the same to T., and the order is subject to the approval of W., and W. afterward approves the same and directs L. to deliver to T. the safe, but L. refuses absolutely to do so, held, that T. is not responsible for the refusal or wrong of L., and W. is liable to T. for the damages of the breach of the contract on his part.

Error from McPherson District Court.

ON May 26, 1883, the following order or agreement was signed :

"H. H. Warner, please consign one Mosler O. Bahman fire-proof safe, size inside, 22 inches high, 17 inches wide, 12 inches deep, to M. A. Thompson, town of McPherson, county of McPherson, state of Kansas. The undersigned is to take possession of safe taken in exchange from Loomis Bros. on arrival of their new safe, and agrees to pay \$30 for the same, fifteen dollars on delivery or consignment of safe, with interest at 8 per cent. for balance, which is due in three months; undersigned takes above safe where it stands. This order subject to approval by H. H. Warner. In case of deferred payment, notes to be forwarded to you at the expiration of 25 days from date of invoice, or the amount shall become due at the expiration of 30 days from the date of bill; and I agree to accept and pay draft of amount mentioned above and not to countermand the same. It is agreed that the title to said safe shall not pass until notes are paid, or safe paid for in cash, but shall remain your property until that time. In default of payment you or your agent may take possession of and remove said safe without legal process, and I hereby waive all claims of damage arising from such removal. It is hereby also expressly agreed and understood that the foregoing embodies all the agreements made between us, in any way, hereby waiving all claims of verbal agreements of any nature, not embodied in this order. Truly yours, M. A. THOMPSON.

"Net price, \$30. Short delay."

Warner v. Thompson.

Subsequently, M. A. Thompson brought this action against H. H. Warner for a breach of contract, alleging that a new safe arrived at McPherson, in this state, for Loomis Bros., on July 25, 1883, and thereupon he made demand of said Loomis Bros. for the possession of the second-hand safe mentioned in said order or agreement, but the same was refused to him, the said Loomis Bros. declaring they would neither accept the new safe nor let the old one go. The defendant filed an answer, which contained, among other things, a general denial, and set forth said order or agreement between the parties; but also alleged that the condition precedent to the taking effect of said order was that the defendant should approve the same, and that the defendant had never approved it and had always refused so to do. The defendant for a third defense set forth that —

“The words in said order, to wit, ‘The undersigned is to take possession of safe taken in exchange from Loomis Bros. on arrival of their new safe,’ mean ‘on arrival and acceptance by Loomis Bros. of their new safe;’ that this was a condition precedent to the taking effect of the contract between the parties to this suit; that Loomis Bros. never did accept their new safe, and defendant denies that he agreed to sell or deliver to plaintiff said safe until Loomis Bros. accepted their said new safe.”

To this third defense the plaintiff demurred, which demurrer, after argument and consideration by the court, was sustained. To the other portions of the answer, the plaintiff filed a reply alleging that the defendant ratified the order and agreement set forth in his answer. Trial had at the October Term, 1884, by the court without a jury. The court, at the request of the defendant, made the following findings of fact:

“1. The contract set up in defendant’s bill of particulars was made and entered into by the plaintiff and defendant.

“2. The defendant ratified or approved the sale of the safe therein made by his agent.

“3. Both plaintiff and defendant well knew at time of contract that the old safe had not come to the possession of defendant, and that he only had then an equitable title or interest in it or a contract of trade for it.

Opinion of the Court.

"4. Both parties supposed in good faith at time of contract that said safe would come fully to the ownership and possession of defendant.

"5. Said safe did not come to the ownership or possession of said defendant, the Loomis Bros. named refusing to accept the new safe and therefore refusing to give up the old.

"6. Said new safe came for Loomis Bros. in a reasonable time, and thereupon plaintiff demanded and offered to take the old safe as per his agreement.

"7. Said plaintiff has at all times been ready and willing to comply with all the conditions of the contract upon his part and the defendant the same, only that he could not, because Loomis Bros. would not give up the safe.

"8. The reasonable value of the safe in question was \$65."

Thereupon the court made the following conclusion of law:

"Plaintiff is entitled to recover for breach of the contract the sum of thirty-five dollars."

Judgment was entered accordingly for the plaintiff against the defendant for \$35, his damages so found, together with all costs. The defendant excepted to all the findings and the judgment, and brings the case here.

Frank G. White, for plaintiff in error.

M. A. Thompson, defendant in error, for himself.

The opinion of the court was delivered by

HORTON, C. J.: It is alleged that the court erred in sustaining the demurrer filed by plaintiff below to the third defense set up in the answer of defendant. We think not. The order or contract provided that the defendant was to take possession of the old safe accepted in exchange from Loomis Bros., on the arrival of the new safe. The third defense interpolated in

1. Contract to be construed by court.

the contract, after the word "arrive," "and acceptance." The defendant cannot be permitted to give his own construction of the contract by adding other words. The interpretation or construction of a writing, unambiguous in its terms, is a matter of law for the court to pass upon.

It is next alleged that the district court erred in sustaining

Warner v. Thompson.

the exceptions filed by plaintiff below to a deposition in behalf of defendant. The deposition was that of Hiram Stockbridge, the general manager of the business of the defendant. It showed, among other things, that on May 31, 1883, the defendant received at his office at Rochester, New York, an order for a safe from Loomis Bros., McPherson, in this state, and at the same time the order from plaintiff below for the old safe to be taken in exchange from Loomis Bros.; that the defendant sent printed notices to Loomis Bros. and plaintiff below, and that the defendant acknowledged receipt of the orders; that on June 21, 1883, the safe ordered by Loomis Bros. was shipped them by the defendant in exact accordance with their agreement of June 11th, and that the defendant sent to plaintiff below a bill for the old safe on the terms of his order, and also an order on Loomis Bros. for its delivery to him; that Loomis Bros. refused to take the new safe from the depot, or to deliver the old safe to the plaintiff, although the defendant made repeated efforts to induce them to do so. The part of the deposition that the court ruled out was as follows: "The order of said Thompson was contingent upon his taking possession of the safe as stipulated in his order, and has never been approved or accepted by the said H. H. Warner upon any other consideration; that said H. H. Warner never agreed to deliver possession of the safe to Thompson;" and also, "believing Loomis Bros. to have received their new safe, said Warner sent Thompson a bill for the old safe." We perceive no material error in the rejection of this testimony. The contract is in writing, and speaks for itself; and all the testimony attempting to vary or contradict the written order or agreement was incompetent. The defendant was to deliver to Loomis Bros. a new safe, and was to cause Loomis Bros. to deliver the old one to the plaintiff, and defendant was responsible for any failure on the part of Loomis Bros. to deliver the old safe to plaintiff, whatever may have been the cause of such failure. (*Thompson v. Warner*, 31 Kas. 533.) If Loomis Bros. were guilty of a breach of the contract with the defendant, plaintiff below was

2. Contract;
breach; re-
sponsibility.

The State v. Holden.

not responsible, and if the defendant has suffered damages on account of the action of Loomis Bros., plaintiff ought not also to suffer. The defendant was evidently bound to see that the old safe was delivered to plaintiff. If he failed so to do, he was liable for a breach of his contract, as it clearly appears from the evidence in the case that he approved the order or agreement signed by the plaintiff and dated May 26, 1883.

After an examination of the record, we find that there was sufficient evidence to sustain the findings and judgment of the trial court; therefore the judgment must be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. J. F. HOLDEN, *et al.*

REVERSAL OF JUDGMENT, Various Grounds Alleged for; No Material Error. Where the defendants in a criminal prosecution appeal to the supreme court and ask for a reversal of the judgment of the court below for incompetency of their own counsel; neglect and failure on the part of the court below to protect their rights and interests; incompetency of the evidence against them; leading questions; erroneous and misleading instructions; insufficiency of the evidence for conviction, it being in part the evidence of an accomplice; the alleged hearing of a motion for a new trial in the absence of the defendants; and the refusal to grant a new trial on the ground of alleged newly-discovered evidence, *held*, under the circumstances of the case, that no material error was committed by the court below, and that the judgment cannot be reversed.

Appeal from Riley District Court.

PROSECUTION for grand larceny. At the September Term, 1885, the defendants, *J. F. Holden* and *Hiram Hamilton*, were tried, found guilty, and each was sentenced to the penitentiary for four years. They appeal. The opinion states the case.

Sam. Kimble, and *Geo. C. Wilder*, for appellants.

Jno. E. Hessin, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution brought in the district court of Riley county, charging J. F. Holden and Hiram Hamilton with the larceny of a gelding and a mare, the property of Mahlon Parsons. The case was tried before the court and a jury, and the defendants were found guilty, and each was sentenced to the penitentiary for the term of four years. They now appeal to this court. The principal grounds urged by the defendants for a reversal of the judgment of the court below are as follows: 1. Incompetency of the defendants' own counsel. 2. Neglect and failure on the part of the court to properly protect the rights and interests of the defendants. 3. Incompetency of much of the evidence introduced on the trial. 4. Leading questions asked by the attorney for the prosecution. 5. Erroneous and misleading instructions given by the court to the jury. 6. Insufficiency of the evidence for a conviction, it being in part the evidence of a supposed accomplice, and claimed to be unreasonable in itself and not corroborated by the other evidence. 7. The hearing of the defendants' first motion for a new trial in the absence of the defendants. 8. The refusal of the new trial, notwithstanding the newly-discovered evidence.

While it is possible that a trial court, in the exercise of a sound judicial discretion, might properly in some rare instance grant a new trial on the ground of incompetency of a party's own counsel, yet we have never known or heard of a case where such a thing was done. In the present case, the defendants were defended by two counsel, one of whom was appointed by the trial court seven days before the trial was commenced, and the other appeared in the case on the trial without any showing as to how or by whom he was appointed or employed. Presumably, however, he was employed by the defendants themselves or by their friends. But were the defendants' counsel incompetent, or did such counsel improperly manage the defendants' case? We cannot say that the record shows incompetency, or any such unwarranted neglect or mis-

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management of the case as would justify a reversal of the judgment below. It is true that the record shows that some of the evidence of the prosecution, apparently incompetent, was permitted to go to the jury without any objection on the part of the defendants' counsel; and it is also true that many of the facts and circumstances proved by the prosecution, and which were apparently very damaging to the defendants' case, were left wholly uncontradicted and unexplained by any evidence introduced by the defendants' counsel. But it may also be true that all this was really in the interest of the defendants. It may be that objections to any of this evidence, because of its apparent incompetency, would have led to the proof of other facts which would have rendered it competent or would have shown the defendants' guilt much more conclusively than it was shown by this apparently incompetent evidence; and it is possible also that an attempted denial or explanation of the facts proved by the prosecution and not denied or explained by the defense would have resulted in the proof of the defendants' guilt much more conclusively than in fact their guilt was proved. It is to be presumed that counsel knew best what evidence to object to, and whether it would be safe to attempt by the introduction of other evidence to deny or explain the facts proved by the prosecution. It is possible, indeed, that the fewer of the real facts, tending to show guilt or innocence on the part of the defendants, that were disclosed, the better for the defendants. We do not think that the defendants are entitled to a reversal of the judgment of the court below because of any incompetency on the part of their counsel.

We have failed to perceive any such neglect or failure on the part of the court below to properly protect the rights and interests of the defendants as will require a reversal of its judgment. No material evidence prejudicial to the rights and interests of the defendants was erroneously permitted to go to the jury over the objections of the defendants; and no material evidence favorable to the rights or interests of the defendants was erroneously excluded over their objections. No

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leading question was erroneously permitted to be asked over the objections of the defendants. No exception was taken to any of the instructions given by the court to the jury; and, besides, we think the instructions that were given were all proper as correct propositions of law, and applicable to the case; and no instruction was refused. Indeed, we do not think

that the court below committed material error in any respect. And we think the defendants had a fair trial. A trial court is not bound to ex-

clude evidence because it appears to be incompetent, where no objection is made by any of the parties; nor do we think that a trial court is bound to order that certain evidence shall be introduced where no party is seeking to introduce the same. The defendants' present counsel, however, seem to think that the defendants were the especial wards of the court, and that the court was bound to know what was best for the protection of their rights and interests, and was bound to protect the same to the same extent that counsel ordinarily do. This is a mistake. The court sits merely as arbiter between contending parties. Of course the court ought never to sentence a convicted person criminally unless the court believes him to be guilty; nor should the prosecutor ever ask the court to do so unless the prosecutor also believes him to be guilty. We presume, however, in this case, that both the court and the prosecutor believed at the time when the defendants were sentenced that they were guilty. And in all probability they were. At most, we cannot say that they were not or are not guilty. We think we have sufficiently disposed of all the grounds for a reversal of the judgment of the court below down to the sixth.

As to the sixth ground for a reversal, we would say that we think there was ample evidence to support the conviction of the defendants. The accomplice's testimony, if true, was enough, and it was corroborated in several particulars by the other evidence, and the instructions of the court below were correct and amply sufficient upon this subject.

It is claimed that the hearing of the defendants' first motion

No material error committed by trial court.

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for a new trial was in the absence of the defendants; but there is no showing of this kind in the record; and hence it is unnecessary for us to express any opinion as to whether such a thing would be correct practice, or not.

It is further claimed by the defendants, that a new trial ought to have been granted on the ground of newly-discovered evidence. Now it does not sufficiently appear that the evidence supposed to be newly-discovered evidence was really newly discovered; but if it was, still it does not appear that such evidence could not have been procured and introduced on the trial by the exercise of reasonable diligence. The offense for the commission of which the defendants were prosecuted, was committed on the night of July 5, 1885. The defendants were arrested for such offense on September 1, 1885. One of the counsel for the defendants was appointed for them on September 7, 1885. When the other was appointed or employed is not shown. The trial was commenced and completed on September 14, 1885; and the defendants' first motion for a new trial, and all their affidavits relating to newly-discovered evidence and for a new trial, were filed on September 15, 1885; and all these affidavits were from persons whose testimony could have been procured and introduced on the trial, and out of the nine persons whose affidavits were filed, four of them did in fact testify on the trial, and in behalf of the defendants. In all probability these affiants were all present at the trial except one, who was in jail, and his testimony could have been had if the defendants had desired the same. Other objections might be mentioned to the supposed newly-discovered evidence, but we do not think that it is necessary.

The judgment of the court below will be affirmed.

All the Justices concurring.

WILLIAM S. CARROLL V. E. J. WALL.

CITY OF SECOND CLASS — Tie Vote in Council. The mayor of a city of the second class is authorized to give a casting vote upon the confirmation of an officer appointed by him, where the council is equally divided on the question.

Original Proceedings in Quo Warranto.

ACTION brought in this court, May 6, 1885, by *William S. Carroll* against *E. J. Wall*, to determine the right between plaintiff and defendant to the office of city attorney of the City of Kansas. The facts sufficiently appear in the opinion, filed March 5, 1886.

Goodin & Keplinger, N. Oree, and Wm. S. Carroll, for plaintiff.

Thos. P. Fenlon, Sherry & Harlow, and E. J. Wall, for defendant.

The opinion of the court was delivered by

JOHNSTON, J.: This is a controversy concerning the title to the office of city attorney of the City of Kansas, which is claimed by William S. Carroll by virtue of having been elected thereto at the regular election in April, 1883. He was then chosen for a term of two years, and until his successor was elected and qualified. On March 11, 1885, an act amendatory of the law relating to cities of the second class went into effect, which provided that the city attorney should be appointed by the mayor, with the consent of the council. (Laws of 1885, ch. 99.) In pursuance of this law, and on the 13th day of April, 1885, the mayor of the City of Kansas nominated the defendant, E. J. Wall, as city attorney, and submitted his name for confirmation to the council, which was then in session, with all the members present. A vote was taken thereon, upon which the council divided equally, and thereupon the mayor gave a casting vote in favor of confirma-

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tion. The defendant was immediately installed in the office, and now holds and claims the same by virtue of the appointment and confirmation thus made. The question to be decided is, whether the mayor has a right to give a casting vote upon the confirmation of an appointment when there is a tie, and it is purely one of statutory construction. Section 21 of the statute governing cities of the second class, gives the mayor a casting vote, in these words: "The mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other." (Comp. Laws of 1879, ch. 19.) This is a prospective provision, which is broad and general in its terms, and the power therein conferred on the mayor to give a casting vote, if not restricted by other provisions of the statute, extends to a vote upon every question where the council is equally divided.

The plaintiff contends that there are exceptions, and that the provision with respect to appointments is one of them. The language of that provision is: "The mayor shall appoint, by and with the consent of the council, a city marshal, a city clerk, a city attorney, a city assessor, and may appoint an assistant marshal, a city engineer, a street commissioner, and such policemen and other officers as may be necessary." (Sec. 13.) There is no express denial in this provision of the power conferred by § 21 upon the mayor to give a casting vote when the council is equally divided, nor do we think that such an exception arises by implication. Upon certain questions which come before the council, so many votes are required that a tie vote cannot arise, and the mayor is thus precluded from giving a casting vote. Counsel for plaintiff call these exceptions to the rule prescribed in § 21, and liken them to the provision enacting that appointments shall be made with the consent of the council. In § 19 of the act it is provided that the council, by a vote of the majority of all the members elect, may, for cause, remove certain officers; and in § 42 of the same act it is said that "no ordinance providing for the borrowing of moneys, levying taxes, or appropriating money, shall be of any validity unless a majority of all the councilmen elect shall vote

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for such ordinance." In these provisions the legislature has clearly taken the questions referred to, outside of that provision of § 21 which gives the mayor a casting vote; but it has made no such requirement respecting confirmations. If it had been the intention to require a majority of the council to consent to or confirm an appointment, it would have been easy to have so said, and in expressing its purpose the legislature would likely have used the same or similar language as was employed in the provisions above quoted. That the legislature explicitly required a majority in those cases and not in the one respecting appointments, argues strongly against the position assumed by the plaintiff.

It is contended that as it is provided that the council shall consent to and confirm the appointment, it necessarily means that the consent must be given by the council acting as a separate and independent body. This can hardly be, as the council is not authorized to act independently of the mayor. It cannot withdraw from or exclude him from its council meetings. The statute provides that when the members meet as a council, the mayor shall be present and preside. And the mere fact that the legislature stated that the council shall confirm, when read in connection with other provisions of the act, does not manifest an intention to exclude the mayor from giving a casting vote.

Mayor may give
casting vote,
when.

In the sections conferring power upon the mayor and council, the usual and almost the only form of expression employed is, that "the council shall have power" to do this, that and the other, making no mention of the mayor; and yet no one would argue that it was intended that the council should act apart from and independently of the mayor. And it would also be readily conceded that if the council should divide equally upon the exercise of many of the powers conferred, the mayor would have a deciding vote. The provision that the council shall confirm an appointment is no more restrictive of the power given in § 21 than other provisions of the act where the council alone are mentioned. The power conferred upon the mayor by that section cannot be held to have been

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taken away or restricted by other provisions of the statute, unless they are clear and unambiguous to that effect.

The other matters brought to our attention by the plaintiff are not material, and therefore the relief which he asks must be denied. Judgment for costs will be given in favor of defendant.

VALENTINE, J., concurring.

HORTON, C. J. : I do not think it good policy for the mayor to be permitted to give the casting vote upon the confirmation of his own nominations to the city council; and unless the language of the statute imperatively demands such a construction, the mayor should have no vote in the confirmation of his appointments. I think the words that "the mayor shall appoint, by and with the consent of the city council," should be construed to mean that, while the mayor may appoint, the council *alone* shall confirm, and that it was not the intention of the legislature to permit the mayor to control or participate in the confirmation by giving him the casting vote.

JAMES W. SPALDING, *et al.*, v. GEORGE W. WATSON.

LAND, DIVIDED; *Parts Taxed Separately; Valid Tax Deed.* A quarter-section of land may be divided into eighty-acre tracts and assessed and taxed separately; and this may be done in some cases although the property may belong to one individual; and where a quarter-section is so assessed and taxed, it will be presumed, in the absence of anything to the contrary, that the officers did their duty; and a tax deed founded upon such assessment and taxation will be held to be valid, where nothing else appears that would render it invalid.

Error from Wabaunsee District Court.

ACTION brought by *Watson* against *Spalding* and two others, to recover certain land in Wabaunsee county. Trial at the March Term, 1884, and judgment for plaintiff. The defend-

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ants bring the case to this court. The opinion states the material facts.

H. H. Harris, and *Foster & Hayward*, for plaintiffs in error.

Robt. A. Friedrich, and *Irwin Taylor*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by George W. Watson against James W. Spalding, F. H. Foster and F. M. Hayward, to recover the northwest quarter of section 33, township 13, range 13, in Wabaunsee county. The case was tried before the court, without a jury, and the court made certain special findings of fact and conclusions of law, and rendered judgment in favor of the plaintiff and against the defendants for the recovery of the land, and for costs. To reverse this judgment the defendants now bring the case to this court.

The plaintiff below claims title under the original patent, issued by the United States on September 10, 1860, to Samuel McClellan, and also under a tax deed issued by the county clerk of Wabaunsee county to C. F. Kenderdine, on September 8, 1882, and recorded on the same day. The defendants claim title under a tax deed executed by the county clerk of Wabaunsee county to B. W. Clark, on July 29, 1870, and recorded on the same day. We shall assume that the tax deed under which the defendants make their claim of title is valid, and that it cuts off all titles existing at the time when it was executed and recorded. The question then arises: Is the plaintiff's tax deed valid, or not? If it is valid, it will also cut off all prior titles, and give to the plaintiff a perfect title to the land; for the plaintiff's tax deed is the last one executed, and was executed nearly twelve years after the defendants' tax deed. The plaintiff's tax deed is founded upon a tax sale made in the year 1879 for the taxes of 1878, and the principal objection urged against its validity is, that the land in dispute was not assessed and taxed in 1878 as one tract, but was assessed and taxed as two eighty-acre tracts, to wit: "The east

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half" of said quarter-section, and "the west half" of said quarter-section. Now why this mode of assessment should render the tax deed void, or any of the tax proceedings void, we cannot understand. Eighty-acre tracts of land, or half-quarter-sections, are legal subdivisions, and when government lands are offered for sale at public auction, they are always so offered in half-quarter-sections. (U. S. Rev. St., ch. 7, § 2353.) And in Iowa, when the owner of any real estate is unknown, it is always required that each sixteenth part of the section, or other smallest subdivision of land, shall be assessed and taxed separately. (McClain's Annotated Stat. of Iowa of 1882, title 6, ch. 1, § 826.) And it is generally safer, where the names of the owners of lands are unknown, and where separate portions of the lands are susceptible of clear description, to assess them in separate tracts, as they may be owned by different persons; and if they are, and a joint assessment should be made and all the lands taxed together, the owner of one tract could not ascertain the amount of the taxes due on his land or pay the same, nor could he redeem his land from the taxes when sold, without paying all the taxes imposed upon all the other lands assessed and taxed with his. (*Shimmin v. Inman*, 25 Me. 228, 233. See also *Shaw v. Kirkwood*, 24 Kas. 476; *Kregelo v. Flint*, 25 id. 695.) At the time when the assessment was made in the present case, and now, the act relating to taxation provided, among other things, as follows:

"SEC. 44. Each assessor shall make out, from such sources of information as shall be within his reach, a correct and pertinent description of each piece, parcel or lot of real property, in numerical order as to lots and blocks, sections or subdivisions, in his township or city, as the case may be, and he may require the owner or occupant of such property to furnish such description." (Comp. Laws of 1879, ch. 107, § 44.)

In the absence of anything to the contrary, it will be presumed the assessor did his duty. Indeed, in the absence of anything to the contrary, it will always be presumed that all officers do their duty. We might further say, that the land in controversy was vacant and unoccupied from the beginning

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up to March 1, 1883; that the patent for such land was not recorded in the county until sometime in the year 1883; and that the land was continuously assessed and taxed in separate eighty-acre tracts from the year 1864 up to the present time—from 1864 up to 1870 as “unknown,” and from that time up to 1878 in the name of B. W. Clark, the grantor of the defendants, and presumably it was so assessed and taxed from the year 1870 up to 1878 with the approval of Clark, and presumably he paid the taxes, as thus imposed, up to and including the year 1877; and if so, why should his subsequent grantees, the present defendants, now complain? It is also provided in the act relating to taxation as follows:

“SEC. 139. No irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding or the title conveyed by the tax deed; nor shall any failure of any officer or officers to perform the duties assigned to him or them, upon the day specified, work an invalidation of any such proceedings or of said deed.” (Comp. Laws of 1879, ch. 107, §139.)

We have examined the authorities cited by counsel for the defendants (plaintiffs in error), and do not think that they are applicable under the facts of this case and the statutes of this state. We think the tax deed under which the plaintiff claims title is valid. There are some other objections urged against the validity of this tax deed, but we do not think that they are at all tenable.

The judgment of the court below will be affirmed.

All the Justices concurring.

HENRY L. CLARK, *et al.*, v. FRANK A. PHELPS.

1. **CROSS-EXAMINATION, *No Material Error in Limiting.*** While it is proper for a court to permit a party, on cross-examining the witness of the adverse party, to put questions to the witness, the answers to which may tend to show bias or prejudice toward the party conducting the cross-examination, yet, where many such questions have been asked and answered, and the exact relations and feelings existing between the witness and the party conducting the cross-examination have been shown, the court may not commit material error in refusing to permit further questions for the same purpose to be asked; and *held*, in the present case, that no material error was committed in this respect.
2. ——— ***No Material Error.*** Other matters considered, and *held*, that the court did not commit material error with reference thereto.
3. **IMPEACHING EVIDENCE; *No Material Error.*** The plaintiff introduced evidence for the purpose of impeaching the testimony of one of the witnesses for the defendant, and in doing so introduced some evidence that could not have been introduced in any other manner, and might have been left out of the case entirely; but *held*, under the circumstances of the case, that the court did not commit material and reversible error.

Error from Leavenworth District Court.

ACTION by Phelps against B. C. Clark & Co., to recover money. Trial at the January Term, 1885, and judgment for plaintiff for \$507.50. The defendants, Henry L. Clark and Drusie Clark, administratrix of the estate of B. C. Clark, deceased, as successors to the original defendants, bring the case to this court. The opinion states the material facts.

Stillings & Stillings, for plaintiffs in error.

Lucien Baker, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Leavenworth county by Frank A. Phelps against B. C. Clark & Co., to recover the sum of \$1,344.07, for services and money advanced. The case was tried before the court and

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a jury, and a verdict and judgment were rendered in favor of the plaintiff and against the defendants for \$507.50, and the present plaintiffs in error, as successors to the original defendants below, now bring the case to this court for review.

The first assignment of error is, that the court below refused to permit the defendants below to ask the plaintiff's witness, C. L. Knapp, on cross-examination, the following question: "Didn't you try to get away their [the defendants'] salesmen, so as to leave their [the defendants'] house without salesmen?" This question was not asked for the purpose of obtaining any evidence concerning the merits of the controversy, and it was wholly irrelevant to the merits; but it was asked for the purpose of eliciting evidence tending to show that the witness, Knapp, was prejudiced against the defendants. The court might very properly have permitted the question to be asked and answered. (*The State v. Krum*, 32 Kas. 373.)

1. Cross-examination, no material error in limiting.

But under the circumstances of this case, we do not think that any material error was committed by the refusal. Many other questions were asked and answered tending to show the exact relations existing between the witness and the defendants and his feelings toward them, and hence the refusal to permit this question to be asked or answered was of but very little consequence, and not material error. Besides, courts seldom enter into the small details of transactions, or into the minute investigation of collateral facts, merely for the purpose of ascertaining any bias or prejudice that may possibly exist on the part of the witnesses of the adverse party. Such a course would have a tendency to render the trial of cases interminable.

The next assignment of error is, that the court below erred in refusing to permit the same witness, upon cross-examination, to answer the following question propounded by the defendants, to wit: "State how the fact is—whether the position of book-keeper in the wholesale department is not one of the most responsible positions there can be in a house?" This question has nothing to do with the merits of the case, nor could the answer to the question have affected the merits;

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2. No material error. and we cannot see that the court committed any material error in refusing to permit the question to be answered, although the court, under the circumstances, might very properly have done so, as it had already been shown what the book-keeper received as compensation, and as the object of the question was to show that the position of book-keeper was a more responsible position than that of the plaintiff, Phelps.

The next claim of error is, that the court below asked a certain witness many questions, and, after the answers were given, then remarked: "It is only a basis; that is all I want to get." It is admitted that it would not have been error for the court to have permitted the counsel for the plaintiff to ask the questions, and we cannot say that the court below committed any material error in asking them itself, or in making the remark it did.

The next ruling of the court below complained of is in permitting the plaintiff's witness in rebuttal, James J. Daniels, to detail a conversation had between him and one of the defendants' witnesses, Charles Thompson, who had previously testified in the case, showing what Thompson had said in such conversation that B. C. Clark, who had been the principal plaintiff in this case, but who was then deceased, had said in his lifetime. We cannot say that the court below committed material error in this. The testimony of Thompson concerning this conversation between him and Daniels had previously been given, and Thompson had testified that this conversation was the only one which they had had upon the subject, and that this conversation was had in a car while they were going from Leavenworth to Kansas City. Thompson was asked by the plaintiff on cross-examination the following, among many other questions: "Did you say to Mr. Daniels in any conversation that you had told B. C. Clark that he was in the wrong, and that Frank would beat him in any case?" Thompson answered: "No, sir; I never did." Thompson also testified in substance in answer to other questions by the plaintiff, that he had always stated substantially the reverse of this. The

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only thing which Daniels testified that Thompson said that B. C. Clark said, was as follows: "B. C. Clark told him that there would probably be a law suit, but he should fight it to the end." And Daniels further testified that Thompson said that his (Thompson's) reply to this remark of Clark's was: "If he went into court with the case there was, Frank was sure to beat him." Some of the testimony of Daniels could not have been introduced for any purpose except for the purpose of impeaching some of the testimony of Thompson, and some of it was not proper in the case at all; but, under all the circumstances of the case, we cannot say that the court below committed any such material error in permitting such testimony to go to the jury as will require a reversal of the judgment below.

We do not think that the charge of the court was erroneous or misleading.

The judgment of the court below will be affirmed.

All the Justices concurring.

3. Impeaching
testimony, no
material error
in admitting.

35	46
42	767
35	46
51	582

35 46
68 147

OLIVER MESKIMEN, *et al.*, v. MOSES DAY.

1. **DEED—Acknowledgment—Seal.** Where a notary public takes the acknowledgment of a deed in this state, he should authenticate the same with his notarial seal.
2. **DEED, When Entitled to Record.** Before a deed acknowledged in this state is entitled to be recorded, it must be proved or acknowledged and certified as prescribed by the statute.
3. **DEED, Without Notarial Seal; Record, not Received in Evidence.** The record of a deed filed in the office of a register of deeds May 21, 1888, acknowledged before a notary public in this state, but not authenticated with his notarial seal, cannot be received in evidence under the provisions of § 12, ch. 87, Laws of 1870; § 387a, Code, Comp. Laws of 1879.
4. **RECOVERY OF LAND; Judgment; Costs.** In an action for the recovery of twenty-six acres of real property, in which judgment is rendered in favor of the plaintiff for two acres thereof, the plaintiff is entitled to recover all his costs.

Error from Pottawatomie District Court.

OLIVER MESKIMEN and *Mary Meskimen* brought their action against *Moses Day*, and alleged in their petition as follows :

"The said plaintiffs have a legal estate in and are entitled to the possession of the following real estate, situate in the county of Pottawatomie, state of Kansas, and described as follows, to wit: The northeast quarter of the southeast quarter of section thirty-three, in township seven, of range eleven east, containing forty acres of land; and that the defendant unlawfully keeps said plaintiffs out of the possession of the same.

"Wherefore, the plaintiffs pray judgment against the defendant for the possession of said premises, and for such other and further relief as they may be entitled to."

The defendant filed his answer, alleging as follows :

"Now comes the defendant, and for answer to the petition of the plaintiffs says, that the plaintiffs have not and had not at the commencement of the action, any legal or equitable estate in, nor are or were they or either of them entitled to the possession of the following bounded and described part of the real estate described in the petition in manner and form as therein set forth, to wit: Beginning at the northeast corner of the southeast quarter of section thirty-three, in township seven south, of range eleven east, and running thence west ten rods, thence south thirty-two rods, thence west seventy rods, thence south forty-eight rods, thence east eighty rods, and thence north eighty rods to the place of beginning, containing twenty-six acres of land, more or less, all in Pottawatomie county, state of Kansas; that the defendant is and was the legal and equitable owner in fee simple of all the real estate above described, and in the possession and entitled to the possession thereof, and that he disclaims all right, title and interest in or to the residue of the real estate described in the petition, and did not and does not keep the plaintiffs out of the possession of the same."

Trial at the April Term, 1884. Judgment for plaintiffs for two acres of the land, and that the defendant is entitled to twenty-four acres. The court ordered that each party pay

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the costs by him or them made, respectively. The plaintiffs excepted, and bring the case here.

M. S. Beal, Jno. T. Morton, and Case & Curtis, for plaintiffs in error.

R. S. Hick, and D. V. Sprague, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action in the nature of ejectment, brought by Oliver and Mary Meskimen against Moses Day, to recover forty acres of land. The defendant answered, claiming to be the legal owner of twenty-six of the forty acres, and disclaiming all title to or interest in the residue. Trial by the court, without a jury. The court rendered judgment that the plaintiffs recover two acres of the land in controversy, and decided that the other twenty-four acres belonged to the defendant. Each party was adjudged to pay its own costs. Upon the trial, the plaintiffs proved to the court that a deed, alleged to have been executed by one Wab-se-qua, a Pottawatomie Indian woman, on September 22, 1877, to Mary Meskimen, one of the plaintiffs, and delivered to Oliver Meskimen, the husband of Mary Meskimen, was, after the same had been filed for record in the office of the register of deeds of Pottawatomie county, lost, and that it was not then in the possession or under the control of either of the plaintiffs, and could not be found, although diligent search had been made therefor. Thereupon, the plaintiffs offered in evidence the record of said deed from the office of the register of deeds of said county. The deed purported to have been acknowledged before one F. W. Kroenke, as notary public, but the certificate of acknowledgment was not authenticated with his official seal, or with any seal. The defendant objected to the record being read in evidence, on account of the omission of the seal. This ruling is complained of. Sec. 5, chapter 71, Comp. Laws of 1879, reads:

“Every notary shall provide a notarial seal, containing his name and place of residence, and he shall authenticate all his official acts, attestations and instruments therewith.”

Sec. 15, of chapter 22, Comp. Laws of 1879, reads:

"The certificate of proof or acknowledgment as aforesaid, may be given under seal, or otherwise, according to the mode by which the courts or officers granting the same usually authenticate their official acts."

Chapter 22, Comp. Laws of 1879, regulating the conveyances of real estate, provides that such conveyances may be acknowledged before a notary public; and § 19 of that act reads:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated."

Sec. 387a of the code, Comp. Laws of 1879, provides that the books and records required by law to be kept by any register of deeds may be received in evidence in any court, and when any such record is of a paper or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original. (Laws of 1870, ch. 87, § 12.) The question therefore arises, whether the certificate of acknowledgment of the notary public was sufficient under the statute, without attaching his notarial seal thereto. We think not. As the deed was not properly authenticated, it was not entitled to be recorded. As it was not entitled to be recorded, the record thereof was not competent evidence. The lost deed purported to have been executed September 22, 1877, but it was not filed for record until May 21, 1883; therefore, § 28, chapter 22, Comp. Laws of 1879, does not apply, because that statute took effect October 31, 1868. Neither has § 27, of said chapter 22, any application, and the decision of *Williams v. Hill*, 16 Kas. 23, to which we are referred, has reference only to copies of deeds which have been properly recorded. Since the decision in *Simpson v. Munde*, 3 Kas. 172, the statute regulating the conveyances of real estate has been materially changed. (Comp. Laws of 1862,

Meekimen v. Day.

ch. 41, § 13; Comp. Laws of 1879, ch. 22, § 19; *Wickersham v. Chicago Zinc Co.*, 18 Kas. 481; *Wilkins v. Moore*, 20 id. 538.) After the rejection of the record from the office of the register of deeds, the plaintiffs offered and were allowed to prove the contents of the lost deed. In this way, the court became possessed of all its terms and conditions, and therefore we do not perceive that the ruling of the court rejecting the record of the deed was very material in the case.

The only remaining question is that of costs. These the court divided. In such cases as this, costs follow the judgment, and plaintiffs were entitled to recover all their costs. The ruling of the trial court in this respect was erroneous. Sec. 589 of the code reads:

“Where it is not otherwise provided by this and other statutes, costs shall be allowed, of course, to the plaintiff upon a judgment in his favor in actions for the recovery of money only, or for the recovery of specific real or personal property.” (*City of Emporia v. Whittlesey*, 20 Kas. 17; *Smith v. Woodleaf*, 21 id. 717.)

If the defendant had disclaimed as to all of the land in controversy, excepting the twenty-four acres adjudged to belong to him, of course he would have been entitled to recover costs. (Code, § 590.)

The judgment below will be affirmed, excepting that the costs must be retaxed in accordance with the views herein expressed.

All the Justices concurring.

THE STATE OF KANSAS, *ex rel.* S. B. Bradford, Attorney General, v. THE NATIONAL ASSOCIATION OF THE FARMERS' AND MECHANICS' MUTUAL AID ASSOCIATION.

1. **MUTUAL LIFE INSURANCE; Corporation, Subject to Supervision by the State.** The declared purpose of the defendant corporation is the promotion of charity, as well as the social and moral advancement of its members, who are classified as social and beneficiary members. The expenses of the association are paid, and a charity and beneficiary fund is created, from membership fees, contributions and assessments; but the social members are not required to pay assessments, or to contribute to the charity and beneficiary fund, and are not entitled to any benefit therefrom. The main object of the association is to enter into contracts with its beneficiary members, by which the member agrees to comply with the rules of the association, to pay a membership fee of ten dollars, and an assessment of one dollar upon the death or permanent disability of any other beneficiary member of the section to which he belongs; in consideration of which, the association agrees that upon the death or permanent disability of such member, it will levy an assessment upon the other beneficiary members, and that seventy-five per cent. of the amount collected upon such assessment shall be paid to the beneficiary named in the certificate of such member, provided it does not exceed the sum agreed upon and stated in the certificate. *Held*, That the business done between the defendant and its beneficiary members is that of mutual life insurance on the assessment plan, and that the defendant is subject to the supervision of the superintendent of insurance, and to the provisions of chapter 131 of the Laws of 1885.
2. ——— *Excepted Associations.* That provision of the act providing for the organization and control of mutual life insurance associations which excepts from its operation an association "under the supervision of a grand or supreme lodge," refers only to secret associations, such as Freemasons, Odd Fellows, and the like.

Original Proceedings in Quo Warranto.

ACTION brought in this court, August 21, 1885, by the attorney general in the name of *The State*, against *The Association* above named, to test the right of the defendant corporation to do business in this state without first complying with the insurance laws thereof regulating mutual life insurance companies on the assessment plan, and to oust the de-

36	51
36	264
85	51
48	722

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fendant from such privilege, if the issue be found in favor of *The State*. The opinion, filed March 5, 1886, sufficiently states the case.

S. B. Bradford, attorney general, for The State; *Edwin A. Austin*, of counsel.

S. R. Peters, for defendant.

The opinion of the court was delivered by

JOHNSTON, J.: The state, on the relation of the attorney general, brings this action against "The National Association of Farmers' and Mechanics' Mutual Aid Association," charging that it is engaged in transacting a life-insurance business upon the assessment plan within this state, without having authority or without having complied with the laws of the state respecting the business of life insurance, and praying that the defendant be ousted from the exercise of the franchise of transacting a mutual life insurance on the assessment plan in the state of Kansas, and from the right to enter into and issue contracts, certificates, and policies, substantially amounting to mutual life insurance on the assessment plan in the state of Kansas. The case was tried upon an agreed statement of facts, from which it appears that the defendant is a corporation organized under the laws of Missouri, which operates through state and local societies, and is composed of its charter members, officers, presidents of the state associations, and the representatives or delegates from the local societies. The local societies are composed of persons over eighteen years of age, classified as social members and beneficiary members. One of the declared objects of the corporation is—

"To promote benevolence and charity by establishing a charity fund for the temporary relief of indigent and suffering members and their families, and to provide for the relief and aid of the families of its members, and other dependents of their deceased members, and for assisting such of its members who may be sick or disabled, from the proceeds of the assessments upon its members."

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By its charter it is given power—

“To issue certificates of membership to their members, defining their rights, privileges, duties and liabilities; to create, receive, hold and disburse the funds necessary to accomplish the object of the association, and for its own sustenance and support, including the receipt of membership fees, assessments, and voluntary contributions from the members; the provision for benefits, as named in the certificate of membership, to the sick or disabled members, or to widows, orphans, or dependents of deceased members.”

Any person living within the jurisdiction of a local aid society, who is of temperate habits and good moral character, and who may be socially acceptable to its members, may be admitted as a social member; but social members are not required to pay assessments, or to contribute to the charity or beneficiary fund, and are not entitled to any benefit therefrom. Any person between eighteen and fifty-five years of age, who has been admitted as a social member, and whose physical condition comes within the rules of the association, is eligible to a beneficiary membership. In the application for such membership he is required to answer the usual questions propounded by life insurance companies regarding his physical history and health. Following the questions the application contains a proposition from the applicant to the association in these words:

“To the National Association of the Farmers’ and Mechanics’ Mutual Aid Association: I, —, a member of — local aid society from —, do hereby make application for a beneficial certificate of membership in the F. & M. M. A. Ass’n, and agree to accept and obey the rules and regulations of the association, as the express condition upon which I shall be entitled to the benefits and advantages of the membership, and to a mortuary benefit in case of my death while a member, limited to — dollars. I certify that the answers made by me to the questions which are attached to this application and form a part thereof, are true to the best of my knowledge and belief, and if any material statement made in this application, and upon the faith of which my beneficial certificate will be issued, shall be found in any respect untrue, then it is herein agreed, upon my part, that my certificate shall be null

The State, *ex rel.*, v. National Association.

and void; and it is further agreed that my membership in, and liability to, the association, and its liability to me, under the terms of my beneficial certificate, shall begin upon the approval of this application by the medical director. My beneficial certificate shall bear that date, and continue in force as long as I conform to the rules and requirements of the association; but upon my failure to pay an assessment, as required by the rules of the association, my membership shall be forfeited, and all liability of the association to me, and my liability to it, shall cease." [Signed, etc.]

The applicant is required to submit to a medical examination by a physician designated by the local society, and such examination must be approved by the medical director of the national association before the applicant will be admitted as a beneficiary member. He is also required to pay a membership fee of ten dollars, which must accompany the application. If the application is accepted by the association, it issues a certificate reciting that in consideration of the representations and agreements made in the application, as well as the payment of the membership fee, and also the agreement of the applicant to accept and obey the rules and regulations of the association, and to pay the assessment of one dollar when required for the purpose of paying the benefit, as provided in the certificate issued to beneficiary members, he is constituted and declared to be a beneficiary member of the association, and as such, entitled to all the privileges, benefits and advantages prescribed by the rules and regulations for beneficiary members, and to a mortuary benefit in case of death while a member in such sum as will equal seventy-five cents for each dollar received from the assessment made for that purpose, and not to exceed two thousand dollars. The association further agrees to levy an assessment of one dollar each upon all of the beneficiary members of the association in good standing in the section to which the applicant is assigned, and when collected, to pay the benefit to the beneficiary named in the certificate, upon due notice and proof of the death or permanent disability of the member named therein.

The avowed objects of the defendant corporation, its relations

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with its beneficiary members, and its methods of transacting business, as disclosed by the foregoing statement of facts, clearly show that it has all the characteristics of a mutual insurance company doing business on the assessment plan. It is true that it has a social department, and that in organizing and maintaining local societies composed alone of social members, it is not open to the charge made by the state. It is not the purpose of the state to interfere with the social features of the association, but if it does business in the state substantially amounting to insurance, the mere connection of a social department will not exempt it from the operation of the insurance law, or free it from the supervision of the superintendent of insurance. The social membership, however, appears to be little else than a preliminary step to admission into the class of beneficiary membership, and it is against the business done between the association and the latter class, of which the plaintiff complains. That the contract between the association and its beneficiary members is one of insurance, cannot be doubted. Upon the part of the member is an agreement to pay a membership fee of ten dollars when admitted, and an assessment of one dollar upon the death or permanent disability of any other member of the section to which he is assigned. In consideration of these agreements, the association, in turn, agrees that upon his death or permanent disability, it will levy an assessment upon the other and surviving members and create a mortuary fund, and seventy-five per cent. of the amount so collected shall be paid to the

beneficiary named in the certificate of such member, providing it does not exceed the amount of the benefit mentioned in the contract. Thus it will be seen that they stand toward each other in the relation of insured and insurer, and that the business transacted between them is that of coöperative or mutual insurance, and falls clearly within the decision of this court in the case of *The State, ex rel., v. Insurance Co.*, 30 Kas. 585.

It is admitted by the defendant corporation that it has not complied with the requirements of chapter 131 of the Laws of

1. Insurance corporation subject to supervision by the state.

The State, *ex rel.*, v. National Association.

1885—the statute regulating the organization and control of mutual life insurance associations. It is claimed, however, that the association comes within the exceptions named in § 30 of that act. It reads as follows:

“This act shall apply to all associations or corporations now or hereafter organized in this state, or admitted into this state, to transact any life or accident business on the assessment plan: *Provided*, This act shall not apply to any association of religious or secret societies now existing or under the supervision of a grand or supreme lodge, nor to any class of mechanics, express, telegraph or railroad employes formed for the mutual benefit of the members thereof and their families, exclusively.”

It is not contended that the association falls within any of the classes last mentioned in the proviso, but it is claimed that it comes within the exceptions first mentioned therein. The claim cannot be sustained. It is not an association of, or made up from, religious or secret societies that were in existence when the law was enacted. There is no pretense that it is a religious society, and although it is claimed to be a secret society, nothing brought up in the record indicates that there is any secrecy in the purposes of the association, or in the manner of accomplishing the same. No part of the business done, or of the exercises engaged in, is concealed from the public, and it does not appear that there are any ceremonies, grips, signs, or passwords, such as are peculiar to secret societies. It is further contended that the defendant falls within the other branch of the proviso, *viz.*: That it is an association under the supervision of a grand or supreme lodge. Counsel says that because the national association holds annual meetings at which the local societies have the right to be represented, and that in these conventions the national association legislates and transacts business for the entire membership, and prescribes rules for the government of the local societies, it comes within the exception of the statute, and must be regarded as a grand or supreme lodge. This interpretation is inadmissible. The legislature must be held to have used the words

2. Association, not excepted. “grand or supreme lodge” in their ordinary and popular sense, and so used, they apply only to secret organi-

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zations or supreme bodies constituted from and having jurisdiction over secret societies. The word "lodge," used in the connection that it is here, is defined by Webster to be "a secret association, as of the Freemasons, Odd Fellows, and the like." There is nothing in the act showing that any different or broader signification of these words was intended by the legislature; and as the defendant is not a secret organization, or composed of secret societies, it is therefore not an association "under the supervision of a grand or supreme lodge."

Some argument is made that the act is invalid, so far as it attempts to interfere with the right of the defendant corporation to organize its local societies in this state, but we find no reason in it, or in the cases cited by counsel, to create a doubt respecting the validity of the statute. The defendant is a corporation organized under the laws of Missouri, and has no inherent right to recognition or to transact business within the limits of this state. It can only come and transact business here upon such conditions as the legislature may prescribe, (*Phoenix Ins. Co. v. Welch*, *Supt.*, 29 Kas. 672,) and it needs no argument to show the right of the state to regulate the business of insurance within its limits, which is done by companies organized either within or without the state.

Judgment will be rendered in favor of the state, and in accordance with the prayer of the petition.

All the Justices concurring.

THE MISSOURI PACIFIC RAILWAY COMPANY V. R. A. JOHNSTON.

RAILROAD STOCK LAW; *Confined Animals*; *Company Liable*. Where the owner of domestic animals in a county where the herd law of 1872 was in force, kept the same confined on his own farm, in a pasture inclosed with a good and lawful fence, and the animals, without fault of the owner, escaped from the pasture in the night-time into a public highway and wandered upon uninclosed lands through which a railway runs, adjoining the farm of their owner, and were run over and killed by an engine at a place on the railway where it was wholly unfenced, and their escape from the pasture was not and could not, by the use of ordinary care, have been discovered by the owner until after they were killed, *held*, that such animals cannot be said to be "allowed to run at large;" and further *held*, that the railway company, under the stock law of 1874, was liable for the value of the animals so killed.

Error from Neosho District Court.

ACTION brought by *R. A. Johnston* against the *Missouri Pacific Railway Company*, on August 23, 1884, under the railway stock law of 1874, to recover damages for five three-year-old steers belonging to the plaintiff, alleged to have been killed June 4, 1884, by the defendant in the operation of its railway. The cause was submitted to the court upon the following agreed statement of facts:

"The defendant is a corporation duly organized and incorporated under the laws of the state of Missouri. On the 4th day of June, 1884, and long prior to said date and ever since then, the defendant has been the owner of certain locomotive engines and cars, and has been engaged in operating a railroad through the county of Neosho, in the state of Kansas.

"On or about the 4th day of June, 1884, the plaintiff was the owner of five three-year-old steers, of the value of two hundred and seventy-five dollars, and kept the same confined on his own farm, in a pasture inclosed with a good and lawful fence, in said county of Neosho. On the night of said 4th day of June, 1884, said steers, without fault of plaintiff, escaped from said pasture into a public highway, and wandered thence into and upon certain uninclosed lands in said county of Neosho owned and possessed by one Alva Clark, through which

Statement of the Case.

runs defendant's railway, said lands of Alva Clark adjoining the farm of plaintiff, upon which was said pasture.

"Said steers entered upon said railway in said county of Neosho from said lands of Alva Clark, and were then and there, in the night-time, and upon the same night they escaped from the pasture, run over and killed by the engine and cars of said defendant, about two hundred yards from the pasture from which they escaped as aforesaid. The said railroad of defendant in said county of Neosho, at the time and place where said steers entered upon the same and were killed, was wholly unfenced, and was not inclosed with any fence whatever to prevent said animals from being on said road. From the time of the escape of said steers from the pasture until they were killed, there was no one in charge or pursuit thereof; and their escape from the pasture was not and could not by the use of ordinary care have been discovered by plaintiff until after they were killed. On the 8th day of November, 1872, the board of county commissioners of said county of Neosho, under and by virtue of the powers in them vested by an act entitled 'An act providing for the regulation of the running at large of animals,' approved February 24, 1872, did direct, by an order then duly made, that on and after the 20th day of December, 1872, no steer or other animal in said order named, should be allowed to run at large within the bounds of said county of Neosho, which order was entered upon the records of said board of commissioners on the said 8th day of November, 1872, and was published for four successive weeks next after said entry was made, in the *Neosho County Journal*, a newspaper then published in said county of Neosho, and has been in full force and effect in said county of Neosho at all times since said 20th day of December, 1872.

"On the 7th day of June, 1884, and more than thirty days before the commencement of this action, the plaintiff made demand of H. H. Ludlie, who was then the duly authorized and acting ticket agent and station agent of said defendant at South Mound, in said county of Neosho, for the value of said steers, but said defendant has ever since failed and refused to pay the same. Fifty dollars is a reasonable attorney's fee for the prosecution of this suit.

"It is hereby agreed that the above-entitled action shall be submitted to the court upon the foregoing agreed statement of facts, the court to be at liberty to draw inferences of fact."

Judgment was rendered December 8, 1884, in favor of the plaintiff for \$275, with interest from June 4, 1884, and the

Mo. Pac. Rly. Co. v. Johnston.

sum of \$50 was allowed for attorney's fee, together with the costs, taxed at \$10.95. *The Railway Company* excepted to the judgment, and brings the case here.

David Kelso, and *R. T. Holloway*, for plaintiff in error.

C. F. Hutchings, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: In this case, it appears from the agreed statement of facts that the plaintiff's cattle escaped from his pasture and wandered from the public highway upon the uninclosed land of one Alva Clark, through which the defendant's railway runs; the railway was not fenced, and the cattle entered upon it and were run over by a train; their escape had not been discovered, and there was no one in pursuit; the herd law of 1872 was in force in the county. It is claimed on the part of the railway company, defendant below, that the plaintiff was bound at all events to restrain his cattle; that the killing of the cattle was the result of concurring wrongs, and as the law can neither apportion the damages nor attribute the result to defendant's default, disregarding that of plaintiff, no recovery can be had. *Railway Co. v. Lea*, 20 Kas. 353, and *Sherman and Redfield on Negligence*, § 39, are cited. In *Railway Co. v. Lea*, the owner permitted his cow to run at large in violation of the herd law, and while so running at large the animal strayed upon the track of the railroad and was killed. In this case, the owner of the animals kept them confined on his farm in a pasture inclosed with a good and lawful fence, and, without his fault, they escaped in the night-time from the pasture into a public highway, and wandered thence into uninclosed lands upon the defendant's railway, which railway was wholly unfenced. Therefore the case of *Railway Co. v. Lea* is not controlling.

On the other hand, the agreed statement of facts brings the case within the following decisions of this court: *Railway Co. v. Wiggins*, 24 Kas. 588; *Railway Co. v. Bradshaw*, 33 id. 533; *Railway Co. v. Roads*, 33 id. 640.

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In *Railway Co. v. Wiggins*, it was held that even in herd-law counties the rigorous doctrine of the common law does not prevail, and that an animal cannot be said "to be allowed to run at large" where the owner has taken reasonable precautions to confine the same. In *Railway Co. v. Bradshaw*, it was held that under the railway stock law of 1874, a railway company is required to inclose its road with a good and lawful fence as against all animals against which such a fence would be a protection; and it was further held in the case, that where an unfenced railway passed through a farm and a hog belonging to the owner of the farm escaped, without fault on the part of the owner, and strayed upon the railway within the limits of the farm and was there killed by the railway company in the operation of its road, that the railroad company was liable. In *Railway Co. v. Roads*, it was said that where hogs escape, by mere accident, from a pen in which they are inclosed, no negligence can be properly attributed to the owner therefor; and it was further said that the mere fact that the animals were trespassing upon the land from which they went upon the unfenced railroad track where they were killed, will not, where the plaintiff is without fault, defeat a recovery.

Upon these decisions, the judgment of the district court must be affirmed.

All the Justices concurring.

JOHN J. DYAL, *et al.*, v. THE CITY OF TOPEKA.

1. **JUDGMENT; *Limit of Review in Supreme Court.*** Where no case was made for the supreme court, nor any extension of time given for that purpose, within three days after the judgment was rendered, and the case was not brought to the supreme court within one year after the judgment was rendered, the supreme court cannot review such judgment or any ruling involved therein, or made prior thereto, except so far as such judgment or ruling may be involved in some subsequent ruling properly reviewable by the supreme court, as, for instance, a subsequent ruling on a motion for a new trial.
2. **NEW TRIAL, *no Error in Denying.*** And in such a case, where it is not shown that the motion for a new trial was filed within three days after the judgment was rendered, nor shown upon what ground, if any, the motion for the new trial was made, the supreme court cannot say that the court below erred in overruling the motion for the new trial.

Error from Shawnee District Court.

THE opinion states the nature of the action, and the facts. The plaintiffs *Dyal* bring the case to this court.

James J. Hitt, for plaintiffs in error.

Jasper H. Moss, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Shawnee county, by John J. Dyal and Seward E. Dyal, against the city of Topeka, to perpetually enjoin the defendant and its officers, agents and employes from interfering with the plaintiffs in the use and enjoyment of a certain piece of land which the defendant claims is a part of one of the public streets of the city, but which the plaintiffs claim is not a part of any street, but belongs to them as their separate and individual property. The case was tried before the court below without a jury, at a term of the court begun and held on January 7, 1884. After the plaintiffs had introduced their evidence and rested, the defendant demurred to the evidence, which demurrer was sustained by the court, and the court then

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found generally in favor of the defendant and against the plaintiffs, and rendered judgment accordingly. On February 16, 1884, the plaintiffs filed a motion for a new trial. What the grounds set forth in this motion for a new trial were, or whether any grounds were set forth for a new trial, is not shown by the record. On March 1, 1884, the motion for a new trial was overruled, and the court then extended the time twenty days for making a case for the supreme court. The case was made and served within the time fixed by the court, and it was settled, signed and authenticated on March 27, 1884, and on February 24, 1885, the case was brought to this court for review. Whether the motion for the new trial was filed within three days after the finding and judgment of the court below, is not shown by the record. Nor is it shown upon what grounds the motion for the new trial was made. No case was made for the supreme court within three days after the judgment was rendered, (Civil Code, § 548;) nor was the time for making a case extended within three days after the rendering of the judgment. (*Aetna Life Ins. Co. v. Koons*, 26 Kas. 215.) The time, however, for making a case was extended within three days after the motion for the new trial was overruled; and the case was made, as before stated, within the extended time. Nor was the case brought to this court within one year after the judgment was rendered. (Sec. 556 of the Civil Code, as amended by the Laws of 1881, ch. 126, § 2; *Estate &c. v. Loftus*, 27 Kas. 68; *Bennett v. Dunn*, 27 id. 194; *Brown v. Clark*, 31 id. 521.) Of course, under such circumstances, we cannot review any judgment or order of the district court except the order overruling the motion for the new trial, and such other orders, rulings or judgments as may be necessarily involved in the ruling upon the motion for the new trial; for the case for the supreme court was not made and served within proper time to give us authority to review such other orders, rulings, or judgments, independent of the ruling upon the motion for the new trial. (See the foregoing statutes and authorities.) But, under the circumstances of this case, can we reverse the order of the district court over-

Dyal v. City of Topeka.

ruling the motion for the new trial? As before stated, there is nothing in the case that shows that the motion was filed in time; nor is there anything that shows upon what grounds, if any, the motion for the new trial was made. From anything appearing in the record, the motion for the new trial may have been filed more than three days, and indeed as many as nine days, after the judgment was rendered in the case, and it may not have stated any ground for the new trial, or it may have stated an entirely insufficient ground, one not recognized by any proper practice or by any law. How, then, can we say that the court below erred? Error is not to be presumed, but in all cases where it is alleged, it must be affirmatively shown, and certainly no error has been affirmatively shown in this case. But if we should go further, and examine the evidence introduced on the trial, we should find many defects and imperfections in the plaintiffs' proof. The evidence does not show that the first plat filed by Crane, the plat under which the plaintiffs wish to have their rights determined, was ever signed or acknowledged. Neither does the evidence show that Mrs. Angell, the person under whom the plaintiffs claim title, had any legal title to the property in controversy at any time until some time after Crane had filed his second plat, and at that time the legal title was in Crane, and if the second plat is to govern in this case, then the property in controversy is a part of Quincy street, in the city of Topeka, and the plaintiffs have no right to recover. According to the proof of what the first plat was—the plat itself having been lost—the original western boundary of Crane's addition is indicated by certain "red dotted lines," but where such "red dotted lines" are or were, is not shown by the record. All the record title which Mrs. Angell ever had was a quitclaim deed from Crane; but this quitclaim deed was not executed until after Crane had filed his second plat. The plaintiffs, however, claim that prior to that time Mrs. Angell held under a written contract from Crane; but Crane testified that he never executed any such written contract, and none was introduced in evidence. The evidence also shows that at one time a judgment was rendered in favor

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of the city of Topeka and against Mrs. Angell, determining that she had no interest in the property in controversy. Just when this judgment was rendered is not shown by the record, but counsel for the defendant says that it was rendered on August 5, 1882, after the quitclaim deed was executed by Crane to Mrs. Angell, and before the deed was executed by Mrs. Angell to the plaintiffs. It is wholly unnecessary, however, to comment further upon the evidence, for in the condition in which the case has been brought to this court we cannot decide the case upon the evidence. The fact that no case was made for the supreme court, nor any extension of time given for that purpose, within three days after the judgment was rendered, and the further fact that the

1. Limit of review.

case was not brought to the supreme court within one year after the judgment was rendered, preclude our examination of the judgment or any ruling involved therein, or any ruling of the court below made prior thereto, except so far as such judgment or ruling may be involved in some subsequent ruling properly reviewable by the supreme court, as for instance, the ruling on the motion for the new trial; and the fact that it is not shown that the motion for the new trial

2. New trial, no error in refusing.

was filed within three days after the judgment was rendered, and the further fact that it is not shown upon what ground, if any, the motion for the new trial was made, render it impossible for us to say that the court below erred in overruling the motion for the new trial.

The judgment of the court below will be affirmed.

All the Justices concurring.

B. GRAY V. ELIZABETH I. CROCKETT, *et al.*

1. **DISTRICT JUDGE, as a Witness.** A district judge is not competent as a witness in a cause tried before him.
2. **CHANGE OF VENUE—When Granted, When Not.** A district judge ought not to change the place of trial of a civil action, except for cause, true in fact and sufficient in law, and the cause for such change should be made to clearly appear to the court; but when an affidavit for a change of venue is presented, which is general in its terms, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit and his own personal knowledge that he is so disqualified, cannot be declared erroneous.
3. **VENUE; Order Granting Change, Not Erroneous.** Where a party to a civil action makes an application to the district court for a change of venue, and files an affidavit in support thereof, upon the ground that he is advised by his attorney that the district judge is a material witness in his behalf upon the trial, that he believes such advice to be true, and desires the evidence of the judge at the trial, and intends to procure the same if a change of venue is granted, and the district court upon such application, affidavit, and its own personal knowledge, transfers the case to another district for trial, the order is not erroneous; but if the district court, upon such affidavit, so general in its terms, had overruled the application, the supreme court would not disturb the ruling.
4. **CLAIM OF TITLE; Estoppel.** If one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterward try to assert his title.
5. **SPECIFIC PERFORMANCE; Wife, Estopped from Claiming Title.** Where a married woman owned thirty-three acres of real estate within the limits of an incorporated city, upon which she and her husband lived, and one acre thereof was their homestead, and her title from her husband is not recorded, although the deed under which she claims was deposited with the register of deeds for record, but by him put away in a package where it remained over twenty years, and could not have been found only by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing it, and her husband enters into a written contract for the sale of the real estate, and the wife is present at the time of making the contract, heard its contents stated, knew the terms and conditions thereof, and did not dissent therefrom, except by expressing a desire that the deferred payments pro-

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vided in the contract should draw ten per cent. interest instead of eight, and after an action is commenced against her husband for the specific performance of the contract, to which she is a party, did not disclose her title for more than two years: *Held*, She will be estopped from setting up title to the land, which is not a part of the homestead, to defeat a suit brought against her husband for the specific performance of his contract, and so will the grantee of herself and husband, if such grantee had no actual knowledge of the unrecorded deed and dealt with the land at the time of the subsequent purchase as that of the husband, and had notice of the prior contract of sale.

Error from Douglas District Court.

ACTION brought March 3, 1882, by *B. Gray* against *Elizabeth I. Crockett*, *H. C. Long*, and *Martha M. Long* his wife, to compel them to convey to plaintiff certain real estate. The defendants filed the following answer, omitting court and title:

"*First.* They admit that said Elizabeth I. Crockett purchased the real estate described in said petition, but without any notice of the pretended contract set out in said petition, as alleged to be existing between said plaintiff and said defendant *H. C. Long*. And these defendants, further answering, say:

"*Second.* The pretended contract set out in said petition is absolutely void and of no legal effect, and plaintiff should not be allowed to have and maintain his action thereon, because they say that the land described in said pretended contract was one entire body of land less than one hundred and sixty acres in amount, situated in Wyandotte county, state of Kansas, and not within the limits of an incorporated town or city, and was at the time of the signing of said pretended contract by defendant *H. C. Long*, occupied as a residence by the family of said *H. C. Long* and the defendant *Martha M. Long* his wife, and the defendants aver that said *Martha M. Long* never did sign said pretended contract, and never in any manner assented thereto.

"*Third.* They deny each and every other allegation and averment contained in said petition."

The first trial was had at the July Term, 1882. The court then decided the contract of April 22, 1881, void and of no effect, and rendered judgment for the defendants. The plain-

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tiff brought the case here, and the judgment of the district court was reversed, and the cause remanded for a new trial. (*Gray v. Crockett*, 30 Kas. 138.) At the July Term, 1883, of the court, Gray obtained judgment against the defendants, who brought the case here. That judgment was reversed, and the cause remanded for a new trial. (*Crockett v. Gray*, 31 Kas. 346.) On April 7, 1884, the defendants filed a motion for a change of venue, on account of the alleged bias and prejudice of the district judge, Hon. W. R. Wagstaff. This motion was overruled. The defendants then filed a motion for a change of venue, for the reason that the district judge, Hon. W. R. Wagstaff, was a material witness for the defendants upon the trial of the cause, and that the defendants desired to have his testimony. On May 2, 1884, this motion was sustained, and the cause sent to the district court of Douglas county for trial. Trial at the April Term of the district court of that county for 1884, and in July of that year, a jury being waived. The court made the following conclusions of fact:

"1. At the time and place mentioned in plaintiff's petition, plaintiff made with defendant, H. C. Long, the contract in said petition stated and set forth. The lands in said petition described are the lands mentioned in said agreement, which was reduced to writing, and signed by the parties thereto.

"2. H. C. Long was a married man, and with his wife lived upon said tract of land, which was situated within the city of Wyandotte, and one acre thereof constituted the homestead of H. C. Long and wife.

"3. At the time of the making of the aforesaid written agreement, said Long's said wife was present and heard the contract stated, and knew the terms and conditions thereof, and did not dissent therefrom, excepting that she expressed a desire that the deferred payments should draw ten per cent. interest, instead of eight per cent., as provided in said writing.

"4. She did not sign and was not asked to sign said contract, or to become a party thereto.

"5. No money was paid the said Long upon said contract, but at the time, or before the time provided by said contract for the payment of money thereon, the plaintiff offered to pay the first payment of money required to be paid thereon, which

Statement of the Case.

payment was refused by said Long, who declined to fulfill the same.

"6. Said Long and wife, after the making of said contract, sold the said land so agreed by said H. C. Long to be sold to said plaintiff, to defendant Elizabeth I. Crockett, who, before purchasing the same, had notice of the prior sale thereof by H. C. Long to plaintiff, excepting that said Long did not sell to said Crockett one acre and seven-tenths thereof.

"7. The price paid for the portion of said land purchased by said Crockett was \$8,500.

"8. In the year 1860, and on the thirteenth day of September in said year, said Long made a conveyance of the land mentioned in the said contract of sale by H. C. Long to plaintiff, to one R. L. Vedder, who received said conveyance from said Long, and took and delivered the same to the register of deeds of Wyandotte county for record, but did not pay the fee for recording the same. Said register of deeds received the said conveyance and deposited the same with other deeds within his office, where the same remained until the same was found by the register of deeds of Wyandotte county in the fall of the year 1883.

"8½. Said deed was unrecorded by said register, and would have been found only by a person having such knowledge of the business management of said office as to induce an investigation of the package containing the same, being with other old and unrecorded deeds in said office.

"9. On the 4th day of December, 1860, said Richard L. Vedder conveyed said land by deed with warranty to Martha M. Long, the wife of said H. C. Long, which conveyance was duly recorded in the office of the register of deeds of Wyandotte county, on the — day of —, 1869.

"10. The plaintiff had no actual knowledge of either of said deeds from Long to Vedder and from Vedder to Mrs. Long, until July, 1883."

Thereon, the court made the following conclusions of law :

"1. At the time of the making of the contract of sale set out in the plaintiff's petition, Martha M. Long was the owner in fee simple of the real estate in said contract mentioned and described.

"2. She is not estopped from asserting her ownership of or title to the same, and every part thereof, by reason of any act of hers suffered or done at the time, or before, or since the

Gray v. Crockett.

making of the contract between the plaintiff and H. C. Long, set up by the plaintiff in this action.

"3. Plaintiff in this action is not entitled to a specific performance of said contract.

"4. Defendants are entitled to judgment in this action for costs, and it is so ordered."

The plaintiff excepted to all the findings of fact, and also to the conclusions of law. Judgment was entered in favor of the defendants for costs. Plaintiff excepted, and brings the case here.

Nathan Cree, for plaintiff in error.

J. B. Scroggs, and *Stevens & Stevens*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: It is claimed by the plaintiff that the order directing the trial of this cause to be had in Douglas, instead of Wyandotte county, is void, and if not void, is at least erroneous. The order was based upon the affidavit of H. C. Long, one of the defendants, setting forth that—

"He was advised by his attorney that Hon. W. R. Wagstaff, the district judge, was a material witness for the defendants upon the trial; that he believed the advice to be true, and that he desired the testimony of the judge at the trial, and intended to procure the same if a change of venue was granted."

Section 56 of the civil code reads:

"In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some county where such objection does not exist."

The contention is that a district judge is not "disqualified to sit," even if a material witness in a case, and that the affidavit upon which the order changing the place of trial to Douglas county was made was insufficient, in that it did not set out what the defendants expected to show by the judge,

Opinion of the Court.

nor was it otherwise made to clearly appear that the judge was a material witness.

We do not think the order of the court void. A judge is not competent as a witness in a cause tried before him, for this, among other reasons: That he cannot hardly be deemed capable of impartially deciding upon the admissibility of his own testimony, or of weighing it against that of another. It is now well settled that the same person cannot be both witness and judge in a cause. (1 Greenl. Ev., 12th ed., § 364; *Ross v. Buhler*, 14 La. 312; 2 Bouvier's Law Dictionary, 12.)

Therefore we think that where a judge is a material and necessary witness in a case, he is "disqualified to sit." If the district court had overruled the application to change the place of trial upon the affidavit presented, we would unhesitatingly pronounce the ruling eminently correct, because it seems to us that the true rule in such a case is, that such facts and circumstances must be proved by affidavits, or other extrinsic evidence, as clearly show that the judge is a material and necessary witness; and unless this clearly appears, a reviewing court will sustain an overruling of the application. (*City of Emporia v. Volmer*, 12 Kas. 622.) The affidavit, in this case, for the change of venue, should have disclosed how the attorneys obtained knowledge of the fact that the district judge was a material witness, and all the facts the defendants believed the judge would prove. This

was not done; but, although the affidavit is deficient in this respect, we cannot wholly ignore the personal knowledge of the judge who transferred the case. A judge ought not to transfer a case upon a mere suggestion, or even upon an affidavit stating conclusions only; and no change of venue should be granted except for cause, true in fact and sufficient in law, and all of this should be made to clearly appear to the court; but when an affidavit is presented in general terms for such a change, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit and his own personal knowledge that

1. District judge
as a witness.

3. Venue; order
granting change
not erroneous.

2. Change of
venue—when
granted, when
not.

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he is disqualified cannot be declared erroneous. (*City of Emporia v. Volmer*, supra; *Edwards v. Russell*, 21 Wend. 68; *Moses v. Julian*, 45 N. H. 52.)

The contract set forth in the petition is as follows:

"APRIL 22, 1881.—Agreement between H. C. Long and B. Gray for sale of his farm of thirty-three acres, south side of Tauromee street, Wyandotte, for eight thousand dollars:

"Said Long agrees to sell the said farm for \$8,000, payable as follows: \$500 by the 28th of April, inst.; \$1,500 in three months from date; and balance, \$6,000, in three years, with interest at 8 per cent.

"Gray agrees to make payments as above, and pay Armstrong's commission, not exceeding \$100.

"Gray to have possession when \$2,000 is paid, and deed then to be given and mortgage then given to Long for three years at eight per cent. interest, with the privilege of paying the whole or part sooner.

H. C. LONG.

B. GRAY."

The principal and the important question involving the merits of this case arises upon the following finding of fact:

"At the time of the making of the written agreement, Martha M. Long, wife of H. C. Long, was present, heard the contract stated, knew the terms and conditions thereof, and did not dissent therefrom excepting she expressed a desire that the deferred payments should draw ten per cent. interest instead of eight per cent., as provided in the contract."

A further finding of the trial court is to the effect that Mrs. Long was the owner in fee simple of the real estate in controversy, and as a conclusion of law, upon all the facts found, the court decided that Mrs. Long was not estopped from asserting her ownership or title to the same by reason of any act of hers suffered or done before, at the time, or since the making of the written contract of April 22d. At the time of the execution of this contract, Long and wife lived upon the land within the city of Wyandotte, and the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, under which Mrs. Long claims title, was unrecorded. It had been delivered to the register of deeds of Wyandotte county for record in the year 1860, but was placed with other deeds in a package where

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it remained until found by the register in the fall of 1883. It could only have been found by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing the same. The written contract shows upon its face that H. C. Long sold the land as his own. It is indisputable that the plaintiff supposed he was dealing with Long as the owner of the land; and that both husband and wife were willing to sell is evident from the fact that they did shortly thereafter sell, at an advance. Mrs. Long asserted no title to the premises until after the decision of this court in June, 1883, that the land was within the limits of the city of Wyandotte, and therefore, that only one acre thereof was exempt as a homestead. (*Gray v. Crockett*, 30 Kas. 138.) This was more than two years after the execution of the written contract. Upon the belief that Long was the owner of the land, the plaintiff commenced his suit for a specific performance of his contract on March 3, 1882. This suit was prosecuted by him for over a year without Mrs. Long making her title known, and the money and time of the plaintiff were expended in his attempt to obtain the conveyance which H. C. Long had agreed to execute. When the case was tried at the July term of the court for 1882, it was admitted by all the parties, for the purposes of the trial, that on April 22, 1881, H. C. Long was the owner of the land described in the contract.

Upon the findings of fact, we think Mrs. Long is estopped in equity from now asserting that at the time of the contract between the plaintiff and her husband, she was the owner of the premises described therein. Questions relative to estoppel are not in general controlled by technical rules, but are usually determined upon principles of equity and good conscience. Mrs. Long stood by and allowed the contract to be executed; to some extent she participated in the negotiations preliminary to the execution of the contract. Her silence as to her title, her acquiescence at the time of the contract, and her failure to disclose her title during the earlier stages of this litigation, invoke against her the familiar rule of justice, that if one

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4. Claim of title; estoppel. stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterward try to assert his title. "He who will not speak when he *should*, will not be allowed to speak when he *would*." (*Goodin v. Canal Co.*, 18 Ohio St. 169; *Tilton v. Nelson*, 27 Barb. 595; *Foster v. Bigelow*, 24 Iowa, 379; *Anderson v. Armstrong*, 69 Ill. 452; *Thompson v. Sanborn*, 11 N. H. 201; *Ford v. Loomis*, 33 Mich. 121; *Beatty v. Sweeney*, 26 id. 217; *Doughrey v. Topping*, 4 Paige's Ch. 93.)

Judge Thompson, in an article concerning estoppels against married women, says:

"If a married woman owns real property, but her title is not of record, and her husband enters into a contract for the sale of it, of which she is informed at the time and to which she makes no objection, she will be estopped from setting up her title to the land to defeat a suit brought against her husband for specific performance of his contract, and so would her grantee."

(8 Southern Law Review, N. S. 275-310; *Smith v. Armstrong*, 24 Wis. 446; *Catherwood v. Watson*, 65 Ind. 576.)

5. Specific performance; wife estopped from claiming title. We are therefore of the opinion that the conclusion of law of the trial judge that Mrs. Long was not estopped from asserting her ownership or title to all the premises in dispute, is erroneous, and cannot be sustained.

It is again insisted that defendants are entitled to judgment, even though the homestead included only one acre, as the contract was for the entire tract at a price in gross and not so much per acre, and as the homestead acre was inalienable by the husband alone and was in no manner identified in the contract or its price determined, that there is no way of apportioning the price of the thirty-two acres which the husband could sell. In addition to what is stated upon this point in the former opinion of this court in *Crockett v. Gray*, 31 Kas. 346, it appears to us from the record that H. C. Long and wife have no real complaint to make. Upon the trial, the plaintiff offered these

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defendants the privilege of selecting their own homestead; therefore they will have the right to retain any acre of the land described in the contract which they may choose. The plaintiff only asks that his contract be enforced after these defendants select and retain one acre thereof. As was said by Mr. Justice BREWER, speaking for this court when the case was last presented to us for our determination, "it is equitable that the contract of April 22, 1881, be enforced so far as is possible, and not that the contracting party be permitted to avoid his contract obligations." When Mrs. Crockett purchased, she had notice of the prior sale of the premises to plaintiff, and therefore acted with full knowledge of all his rights. (*Meixell v. Kirkpatrick*, 33 Kas. 282.) L. H. Wood was the agent for Mrs. Crockett, and when she purchased, on December 24, 1881, she had no actual knowledge of the deed from Long to Vedder of September 30, 1860. This deed was found by Wood in a package in the register's office about September 10, 1883; therefore Mrs. Crockett bought the land with ignorance of the title of Mrs. Long, and like the plaintiff, supposed she was dealing with Long as the owner. After the first trial of this case, Mrs. Crockett became afraid of her title, and desired to sell the land. L. H. Wood then negotiated a sale of it from her to his father-in-law, the latter paying the same price that Mrs. Crockett did, with interest on her money. As all of these sales were made through L. H. Wood, and as he acted as agent both for Mrs. Crockett and his father-in-law, and had notice of all the rights of plaintiff, the latter parties are charged with his knowledge. Wood and the principals for whom he acted dealt with the land as that of Long, upon the belief that the contract of April 22, 1881, could be avoided, solely because the land described therein was outside of the limits of the city of Wyandotte, and therefore, being the homestead of H. C. Long and wife, could not be alienated without their joint consent.

The attempt to set aside the contract of April 22, 1881, upon the ground that Mrs. Long was then the owner of the premises, is an afterthought, evidently not contemplated when the joint

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answer of the defendants was filed. The statute provides that in cases decided by this court when the facts are found by the court below, this court will send a mandate to the court below directing it to render such judgment in the premises as it should have rendered upon the facts found. Under the statute, therefore, in view of the conclusion obtained, as none of the findings are excepted to by the defendants, the cause must be remanded, with directions to enter judgment for the plaintiff. (Code, § 559.) Of course the plaintiff is only entitled to the enforcement of the contract of H. C. Long. He did not bargain for or purchase the *supposed inchoate interest* of Mrs. Long. She did not sign the contract, and was not asked to sign the same. The plaintiff is entitled to what his written contract calls for. The decree, however, for the specific performance of the contract, as well on the part of H. C. Long, as of Mrs. Crockett, must be so framed as to fully protect such inchoate interest of Mrs. Long, as the wife of H. C. Long, whether owned by herself or subsequent to the contract transferred to her co-defendant, Mrs. Crockett. The rights of the plaintiff are the same as though the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, had never been executed, and as though there had been no conveyance subsequent to the contract, from H. C. Long to Elizabeth I. Crockett.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

MARY A. NEWKIRK V. JOHN W. MARSHALL, *et al.*

1. OCCUPATION UNDER DEVISE; *Ejectment, Not Maintained.* Where a husband, with his wife and daughter, settles upon and occupies a quarter-section of government land under the homestead laws of the United States, and makes the proper entry for that purpose, and while so occupying the same, and just before his death, and about five years after such settlement, he executes a will, giving his personal property to his wife, and giving the west half of the quarter-section to his wife and the east half to his daughter, and, also, in his will appoints his wife as executrix of his last will and testament, and guardian for his daughter, who is a minor, and soon thereafter dies, and immediately after his death his wife has the will probated and is appointed executrix under it, and receives the personal property under the will, and orally gives the east half of the real estate to the daughter, and promises to make a deed therefor, and she also makes final proof with regard to the homestead settlement, occupancy, etc., and the patent is afterward issued to her; and while these things are transpiring the daughter marries, and she and her husband, in pursuance of the parol agreements and understandings with the widow, who is the step-mother of the daughter, that the daughter shall have the east half of said land, take possession of such east half, make valuable improvements thereon, and occupy the same as their homestead for about two years, when the husband dies; and afterward the daughter goes to Kentucky, where she remains for about ten years, and while there the land is in charge of the step-mother, but the step-mother at all times recognizes the daughter's ownership thereof, and while there both the daughter and the step-mother are again married, and the daughter with her husband returns to the land, and the step-mother still recognizing the daughter's ownership thereof and still promising to make a deed to the daughter therefor, the daughter and her husband take possession of the land and make further improvements thereon, and the parties then quarrel, and the step-mother then forbids their going upon the land, but they do go upon the land and occupy the same as their homestead; and there is no evidence as to whether the step-mother's husband ever expressed any consent or not that the land should belong to or be occupied by the daughter and her husband; and afterward the step-mother commences this action in the nature of ejectment, to recover the property from the daughter and her husband: *Held*, That the action cannot be maintained.
2. HOMESTEAD LAWS; *Vested Rights.* Under the United States homestead laws and by a compliance therewith, a vested right is obtained

35	77
36	453
36	454
37	303

35	77
47	689

35	77
67	786

35	77
69	707

35	77
174	890

35	77
79	832

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in the homestead at the expiration of five years from the entry thereof.

3. ——— *Patent, When.* When proper proof of settlement, occupancy, etc., is made in such a case, the person to whom the patent should be issued is entitled to the patent immediately, and may then contract with reference to the land the same as though the patent had already and in fact been issued.
4. *STATUTE OF FRAUDS; Consideration.* In this case, the taking of the possession of the land by the daughter and her first husband under the parol agreements between them and the step-mother, and the making of lasting and valuable improvements thereon, took the case out of the statute of frauds and also supplied a sufficient consideration for the property, and the acts of the parties since that time have enhanced and made stronger the daughter's equities in and to the land.
5. ——— Under the facts of this case, the daughter is in equity entitled to the land.

Error from Chase District Court.

EJECTMENT, brought by *Newkirk* against *Marshall* and wife. Trial at the July Term, 1884, and judgment for defendants. The plaintiff brings the case to this court. The opinion states the facts.

Madden Brothers, and *F. P. Cochran*, for plaintiff in error.
Kellogg & Sedgwick, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by Mary A. Newkirk against John W. Marshall and Mary E. Marshall, in the district court of Chase county, for the recovery of certain land situated in that county. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of the defendants and against the plaintiff, and also made special findings of fact; and upon this general verdict and these special findings, the court below rendered judgment in favor of the defendants and against the plaintiff. The plaintiff brings the case to this court for review.

Opinion of the Court.

The facts of the case appear to be substantially as follows: In the year 1861 the northwest quarter of section 8, in township 22, of range 8 east, in Chase county, was government land. Sometime during that year Augustus M. Landsbury, with his wife Mary A. Landsbury, and his daughter Mary E. Landsbury, who was then a girl of about 9 or 10 years of age, settled upon and occupied this quarter-section of land as their homestead. Landsbury also made an entry for the land under the homestead laws of the United States, but just when he made it, is not shown. On November 27, 1866, Landsbury executed a will, giving to his wife, Mary A. Landsbury, all his personal property and the east half of said land, and to his daughter, Mary E. Landsbury, the other half of the land, and appointed his wife executrix of his last will and testament, and guardian for his said minor daughter. Soon afterward, and sometime in the year 1866, Landsbury died. On January 7, 1867, Mrs. Landsbury caused the will to be probated in the probate court of Chase county, and she was also appointed executrix under the will; and there was also evidence tending to show that she was appointed guardian for her step-daughter, the said Mary E. Landsbury. At the July term of the probate court of Chase county, Mrs. Landsbury made a report, showing that she had paid the debts of the estate and had a balance remaining in her hands belonging to the estate of \$718, and further showing as follows: "Said balance is in the hands of said Mary Ann Landsbury, as the lawful owner by law of said property, except the one-half of homestead she now lives on, which belongs to Mary Eliza Landsbury, the daughter of deceased." Some time after Landsbury's death, but just when is not shown, Mrs. Landsbury, as his widow, made final proof, under the United States homestead laws, of the settlement and occupancy of the aforesaid land, and also of Landsbury's death, and that she was his widow. Mary E. Landsbury continued to reside with Mrs. Landsbury on the east half of said land, and during all that time it was understood and agreed between them that Mary E. Landsbury owned the west half thereof, and that

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Mrs. Landsbury should at some time execute a deed to her for the same. Sometime in the year 1869, or 1870, Mary E. Landsbury was married to William Wagoner. On May 2, 1870, the patent for the entire quarter-section was issued by the United States, conveying the title to Mrs. Landsbury. At that time all the improvements were on the east half thereof. Some time after the marriage of Mary E. Landsbury to William Wagoner, they, in accordance with the understanding and agreement of all the parties that the west half of said quarter-section belonged to Mrs. Wagoner, and under the promise of Mrs. Landsbury that she would execute a deed therefor to Mrs. Wagoner, Mrs. Wagoner and her husband took possession of the land, made permanent improvements thereon, and occupied the same as their residence and homestead for about two years, when Wagoner died. The improvements made on the land by them during their occupancy were worth about \$75. Soon after Wagoner's death Mrs. Wagoner removed to the state of Kentucky, and resided there for about ten years. During all the time that Mrs. Wagoner remained in Kentucky Mrs. Landsbury had charge of this land as well as of the east half of the quarter-section, leasing the same, receiving the rents and profits thereof, and paying the taxes thereon, and, for a part of the time, occupying the same herself, but all the time recognizing Mrs. Wagoner as the owner thereof—that is, as the owner of the west half of the quarter-section. Also, while Mrs. Wagoner was in Kentucky, both she and Mrs. Landsbury were married. Mrs. Wagoner was married to John W. Marshall, and Mrs. Landsbury to a man by the name of Newkirk. In February, 1881, Mrs. Marshall returned from Kentucky to Kansas, her husband, John W. Marshall, having preceded her some three or four weeks. For some time afterward they resided with Mrs. Newkirk on the east half of said quarter-section, and during nearly all this time Mrs. Newkirk still recognized Mrs. Marshall as the owner of the west half of the quarter-section, and accordingly permitted Marshall to make improvements thereon as though the land was his wife's; but finally Mrs. Newkirk and Marshall quar-

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reled, and then she told Marshall that they should not have the land unless they got it by law, and forbade his moving upon the land. Shortly afterward, however, he, with his wife, did move upon the land, and they have continuously occupied the same as their homestead and residence ever since, and have continued to make improvements thereon. The improvements made upon the land by them after they took possession thereof, and before and after they occupied the same as their homestead, are worth about \$368. Whether Newkirk ever expressed any assent or dissent with respect to the Marshalls' claim to the land, is not shown. The land, however, at the time the Marshalls took possession thereof, was in the actual possession of a tenant of Mrs. Newkirk, which tenant also resided thereon. Soon after the quarrel between Marshall and Mrs. Newkirk, Mrs. Marshall demanded a deed for the land from Mrs. Newkirk, but she refused, and some time afterward, to wit, on April 2, 1883, Mrs. Newkirk commenced this action against the Marshalls to recover the land from them. Mrs. Newkirk always up to the time of the said quarrel recognized Mrs. Marshall as the actual and present owner of the land in controversy, with an actual and present right to the possession thereof, and always agreed that she would execute a deed for the land to Mrs. Marshall, although no particular time was ever fixed for the execution of such deed.

Under the foregoing facts, has Mrs. Newkirk a right to recover the land in controversy? The court below held that she has not, but Mrs. Newkirk claims that she has such right, and claims that the court below erred, and founds this claim principally upon the ground that no consideration for the land ever passed from Mrs. Marshall to herself. Was such a consideration necessary, under the circumstances? It must be remembered that Mrs. Newkirk herself never paid any consideration for the land. She procured the title thereto merely by virtue of being the widow of Augustus M. Landsbury, who settled upon it and occupied it with his family under the homestead laws of the United States, and his right did not depend upon her any more than it depended upon his daughter

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Mrs. Marshall. If he had lived he could have procured the title thereto by occupying it with his daughter alone, just as well as he could have done by occupying it with his wife alone. A homestead can be entered under the homestead laws of the United States only by the "head of a family," (U. S. Rev. St., § 2, 289,) which shows that the homestead entry is for the benefit of the whole family, and not for any single individual. The homestead under such laws is virtually a gift or donation by the general government to the family; and hence, when the title to such homestead is taken in the name of any single member of the family, there should not be much consideration required to vest the title to a fair proportion thereof in another member of the family. Landsbury in the present case entered and occupied his homestead for the benefit of himself and his wife, the present Mrs. Newkirk, and his daughter, the present Mrs. Marshall, and when he died it seems only fair and just that the homestead should be equally divided between the survivors. This was thought to be just by all the parties, and Landsbury so expressed it in his will; and after providing in his will for the division of his homestead equally between his wife and daughter, he then gave all his personal property to his wife, which, in all probability, he would not have done if he had not expected the real estate to be equally divided between them. And his widow and daughter constituted a family till long after the patent was issued. Under such circumstances, should there be much consideration required to pass from the daughter to the widow in order that such equitable division of the real property should be made? But it is not always necessary in cases of the equitable transfer of title to land that a consideration should pass from the person obtaining the land to the person from whom the land is obtained. Mr. Pomeroy, in his work on the Specific Performance of Contracts, § 130, uses the following language with respect to gifts or donations of real estate:

" . . . The statute of frauds is satisfied by possession as a part performance, and the general doctrines of equity demand, in addition thereto, a valuable consideration. This latter de-

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mand is answered by the outlays, expenditures and labors of the donee in making the valuable improvements as a consequence of the gift. The doctrine, therefore, has been generally accepted that, when the donee takes possession and makes outlays upon valuable and substantial improvements, in execution of the donation, or does other analogous acts, which would render a revocation or a refusal to complete inequitable, a parol gift of land will be specifically enforced, since the labor and expenditures of the donee supply a valuable consideration, while the possession and betterments constitute a part performance which obviates the statute of frauds. This doctrine has been criticised in some American decisions, and wholly repudiated by others."

Mr. Pomeroy cites a large number of authorities supporting the proposition which he enunciates. (See also *Galbraith v. Galbraith*, 5 Kas. 402; *Twiss v. George*, 33 Mich. 253.)

Under the facts of this case, we do not think that the plaintiff can maintain her action. Under the United States homestead laws, and by a compliance with them, a person entering a homestead, or in case of his death, his widow, or in case of the death of both, his heirs or devisee, obtains a vested right in the homestead at the expiration of five years from the entry thereof, and upon making proper proof is entitled to a patent for the land from the United States. And as soon as a person is entitled to a patent, although it may not yet have been issued, and may not be issued for years, he or she may contract and be contracted with concerning the land, or sell it or convey the same precisely the same as though the patent had already been issued. Equity, in order to do justice and to protect the rights of parties and to prevent frauds, will generally consider that as having been done which ought to be done. And in order to protect the rights of all parties, where a patent is due but has not yet been issued, equity will consider such rights precisely the same as though the patent had in fact been issued on the very first day on which it ought to have been issued.

1. Occupation under devise; ejectment, not maintained.

2. Homestead; vested right obtained.

3. Right to patent, when.

Newkirk v. Marshall.

We might further say, that in this case the burden of proof rested upon the plaintiff, and as the jury found a general verdict in favor of the defendants and against the plaintiff, everything will be considered as having been found in the defendants' favor and against the plaintiff, except such facts as the jury specifically found otherwise by their special findings. And viewing the facts of the case in this manner, we think the taking of the possession of the land by Mrs. Marshall and her first husband under the parol agreements between them and Mrs. Newkirk, and the making of the lasting and valuable improvements on the land, not only took the case out of the statute of frauds, but also supplied a sufficient consideration for the property, and the acts of the parties since that time have enhanced and made stronger Mrs. Marshall's equities in and to the land.

4. Case taken out of statute of frauds; consideration.

The plaintiff also makes some points upon the introduction and exclusion of evidence, and the instructions given and refused; but we do not think that the court below committed any material error in these respects. Upon the entire facts of the case, taken as a whole, we think Mrs. Marshall is entitled to the land in controversy; and believing that no material error has been committed in the case, and that justice and equity have been done, the judgment of the court below will be affirmed.

5. Daughter, entitled to land.

All the Justices concurring.

T. H. WINN V. SIMON ABELES.

1. **UNINTENTIONAL ENCROACHMENT; Possession, Not Adverse.** Where the owner of a city lot undertakes to erect a building upon his own ground, but by inadvertence and ignorance of the true line of his lot, places a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterward to claim any portion of such adjoining lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken will not be adverse.
2. ——— **Lateral Support.** While an owner is entitled to claim that his land shall have the lateral support of the soil of the adjoining land, this right is limited to the soil in its natural condition, and does not include anything which may be placed thereon which sensibly increases the burden.
3. **EXCAVATION on Verge of Lot; Damages.** The fact that a land-owner has erected a building upon the verge of his lot will not preclude an adjacent lot-owner from excavating to the usual depth, and to the extreme limits of his lot, preparatory to the erection of a building thereon, nor make him liable for any damage thereby occasioned to his neighbor's building, providing the excavation is made with reasonable skill and caution, and with no improper motive.

Error from Leavenworth District Court.

THE opinion states the case. Trial at the April Term, 1884, and judgment for defendant. The plaintiff *Winn* brings the case here.

Thomas P. Fenlon, for plaintiff in error.

Lucien Baker, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: Simon Abeles leased to T. H. Winn lot 9 in block 49, in the city of Leavenworth, upon which there was a one-story brick building, for the term of two years, commencing August 1, 1881. Winn took possession at once, and used the building as a dry-goods and notion store, and occupied it for that purpose until the building fell, on April 4, 1883. The falling of the building injured his stock to some

35	85
38	90
35	85
44	740

35	85
67	487
35	85
70	182

35	85
73	506
174	451

35	85
681	282

Winn v. Abeles.

extent, and made it necessary to remove the same to another location. Winn thereupon brought suit against Abeles, charging that he wrongfully and negligently permitted and caused the soil to be excavated and moved from the west side of lot 9 without leaving sufficient support to the building, thereby causing its fall; in consequence of which, he alleged he was damaged to the extent of \$2,801.50, for which he asked judgment. The answer of the defendant was a general denial. At the trial it was shown that the lot adjoining on the west, which was known as lot 10, was owned by one John F. Colyer, by whom it had been owned since 1863. He had erected a brick building on the lot in 1864, which remained there until January, 1883, when he removed it, preparatory to the erection of a large new building. The building upon lot 9, in which the plaintiff was doing business, was erected about 1865, and had been placed from two to four inches over upon lot No. 10, but the fact that it extended beyond the west line of lot 9 was not discovered or known until about the time that the building fell. In February, 1883, Colyer began an excavation on his lot for the building he proposed to erect, digging the full width of the lot, and to the depth of seven feet. Soon afterward Abeles became apprehensive that the excavation would injure his building, and so notified Colyer; but, notwithstanding this, Colyer continued to excavate up to the east line of his lot. On March 14, 1883, Abeles entered into a contract with Colyer by which it was agreed that a party wall should be constructed upon the dividing line between lots 9 and 10, which provided at length for the manner in which it should be done, and how the expense should be apportioned; and it contained a provision looking to the protection of the west wall of Abeles's building. Testimony was offered tending to show that when Abeles observed that his west wall was endangered by the action of Colyer, he proposed to Winn to protect him as well as the building, by the erection of a temporary wall, and that, although the plaintiff knew of the danger occasioned by the excavation, he refused to permit Abeles to thus protect the building. Under the agreement the exca-

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vation was begun for the purpose of putting in a party wall, and some supports were put under the west wall of Abeles's building, but because they were insufficient, or by reason of an unusually strong wind, or for some other reason, the wall fell. The jury made special findings upon questions that were submitted, and also found generally in favor of the defendant.

Complaint is made of the instructions; and counsel for plaintiff says that the question presented for review is, whether the defendant had any right to permit the excavation to be made or to enter into a contract for the construction of a party wall during the term of the plaintiff's lease. Under the lease the plaintiff was of course entitled to the quiet enjoyment of the leased premises without unnecessary interference from the defendant. But if an emergency arose during the term of the lease which made it necessary that something should be done to preserve the building from destruction or material damage, and which did not occur through the fault of the landlord, he would have a right to do whatever was reasonably necessary to preserve it from destruction or injury. This was the ruling of the trial court, and it is not combatted by the plaintiff. He contends, however, that no cause which would justify the interference of the defendant had arisen. His claim is that the building having stood over upon lot 10 for more than fifteen years, the title to that part occupied by the building, by virtue of the statute of limitations, vested in Abeles; and therefore Colyer had no right to excavate under the wall beyond the limit of lot 10, and that Abeles had no right to apprehend an encroachment, or to consent to an interference with the wall as it stood. The court below proceeded upon the theory that Colyer owned and had the right to use all of lot 10, and the question therefore arises whether the occupancy of a portion of the adjoining lot by the building is such a possession as would ripen into a title in favor of Abeles. Undoubtedly the strip had been occupied by the Abeles building for more than fifteen years; but possession alone is not sufficient to confer title. The holding must be hostile and adverse as

Winn v. Abeles.

against the true owner. There must, in addition to actual possession, be an intention of the party in possession to claim the land as his own. The occupancy of Abeles was not taken under color or claim of title; nor was there any purpose to oust or dispossess Colyer. The undisputed facts show that Abeles had no knowledge that his building extended beyond the boundary line of his lot, until about the time that this controversy arose. He supposed his building rested entirely upon lot 9, and made no claim to any portion of the adjoining lot, and he is here now asserting that he does not own or claim the narrow strip of lot 10 upon which his wall had inadvertently been placed. Colyer was equally ignorant that the building of Abeles extended beyond the dividing line of the lots. No survey had been made, and it does not appear that there was any agreement that the line to which the wall extended should be taken as the true line. It will thus be seen that there was no adverse possession. One of the essential requisites to obtaining title through the statute of limitations was wanting, viz: the intention of Abeles to claim the land exclusively and as his own. "Mere occupation by inadvertence or mistake without *any intention* to claim title may not be a disseizin, as where a fence is erroneously erected not on the dividing line." (*Abbott v. Abbott*, 51 Me. 575.)

1. Unintentional
encroachment;
possession, not
adverse.

In *St. Louis University v. McCune*, 28 Mo. 481, an alleged encroachment beyond the boundary line was under consideration, and the court held that if the party erected an improvement accidentally upon the land of another through mistake or ignorance of the correct line dividing the tracts, and without intending to claim beyond the true line, the occupation thus taken and the possession which followed did not work a disseizin.

In *Hitchings v. Morrison*, 72 Me. 331, a case where a party claimed title to a strip upon an adjoining lot upon the basis of adverse possession, it was held that if the occupation was not accompanied by a claim of title in fact, but was merely inadvertence or mistake as to the extent of his line, without

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intention to claim title to the extent of his occupation, but only to the bounds described in his deed, then it was not adverse and would not give title.

In *Howard v. Ready*, 29 Ga. 152, it was held that a possession originating in and continuing under a mistake or misapprehension as to the true lines dividing two lots of land, will not ripen into statutory title. The current of the authorities runs in the same line. (*Rickard v. Hibbard*, 73 Me. 105; *Brown v. Cockerall*, 33 Ala. 38; *Enfield v. Day*, 7 N. H. 457; *Riley v. Griffin*, 16 Ga. 141; *Brown v. Gray*, 3 Greenl. 126; *Walbrunn v. Ballen*, 68 Mo. 164; Sedgwick and Wait on Trial of Title to Land, §§ 759, 760; Tiedeman on Real Property, § 699.)

Counsel for plaintiff insists if the occupancy continued during the statutory period it will constitute an adverse holding, even if the building was extended over the boundary line through a mistake, and cites *French v. Pearce*, 8 Conn. 439, and some other authorities, to sustain his position. The authorities which he cites do not go to the extent claimed. It is evident from the foregoing authorities that in a question of boundaries, possession does not count for as much as where the whole tract is held adversely against a claimant. The authorities which he cites only go to the extent of holding that property occupied by a mistake, and which is *claimed* by the occupant *as his own*, will constitute an adverse possession. None of them hold that the intention to appropriate the property occupied as that of the occupant can be dispensed with. In *French v. Pearce*, *supra*, so much relied on by counsel, it was expressly held that the intention of the possessor claiming adversely is an essential ingredient, and that the person entering upon the land under a mistake must actually hold it as *his own*. The same court at a later day, in passing upon a case where a division fence between the lands of A and B was a stone wall three feet wide set wholly on the land of A, and B had for more than fifteen years held exclusive possession of his own land up to the wall, treating the center of the wall as the dividing line, and believing it to be so, but with no knowledge of such claim on the part of A, and with no other possession of the ground covered

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by the wall, held that there was not a sufficient adverse possession to vest in B a title to the center of the wall. (*Huntington v. Whaley*, 29 Conn. 391.) It follows from these authorities and the undisputed testimony that the accidental and inadvertent encroachment upon the four-inch strip of Colyer's lot will not constitute an adverse possession.

It is further urged in behalf of the plaintiff, that the Abeles building having stood for twenty years or more upon the land of another gave its owner a prescriptive right in such land for the support of his building. The old rule respecting ancient buildings invoked by the plaintiff, and which is said to be in analogy to the rule as to ancient lights, is a doctrine unsuited to the condition of things existing in this country, and which it has been decided cannot be recognized or made applicable here. (*Lapere v. Lucky*, 23 Kas. 534; *Hicott v. Morris*, 10 Ohio St. 523; *Wood on Nuisance*, § 200.) Much of the argument made in support of the claim that Colyer had no right to excavate to the extreme limits of his lot is based upon the theory that the west wall of the Abeles building was a party wall, which it appears was not the fact. The wall was entirely separate and independent of any other structure on lot 10, and the owner of that lot had never owned lot 9 or contributed toward the construction of the wall, nor had either of the parties ever treated or regarded it as a party wall. It was built upon the surface, did not extend the full length of the lots, and had none of the characteristics of a party wall; and the rules relating to party walls do not, therefore, apply. Colyer was the absolute owner of all of lot 10, and had entire dominion over the same, both above and below the surface, limited only by the rule that he should so use it as not to injure the property or impair the existing rights of others. It is insisted that the rule last mentioned gave Abeles the right to the support of the soil of lot 10 for his wall, a support which could not be disturbed by excavations. This contention is certainly not sound. Abeles was entitled to the lateral support of the soil of the adjoining lot, but this right did not extend to the support of the

2. Lateral support.

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buildings which he might have placed on his lot. The right extends only to the soil, and does not include anything placed thereon which sensibly increases the pressure. A person cannot be deprived of the use of his land for ordinary and legal purposes by reason of the fact that an adjoining land-owner may, before that time, have erected a structure upon his land. It has been held that a man who builds a house adjoining his neighbor's land should foresee the probable use by his neighbor of the adjoining land, and by an agreement, or by a different arrangement of his house, secure himself against future interruption and inconvenience. (*Thurston v. Hancock*, 12 Mass. 220.) The reason for the rule has been stated to be —

“That if one land-owner sees fit to erect a house at the confines of his own land, it is his own folly, and he cannot, by being prior in point of time, prevent his neighbor from building there also, and the only restriction imposed upon the adjacent owner is that he must not negligently or carelessly excavate upon his own land, but if he proceeds with ordinary care he will be excused from liability, no matter how great the damage of his neighbor's buildings.” (*Wood's Law of Nuisances*, § 185.)

It seems to be well settled by the authorities that where an excavation is made by a lot-owner for an ordinary and proper purpose, which does not extend beyond the limits of his own land, and which is not done unskillfully, negligently or with improper motives, that an injury occasioned to the building upon the adjoining lot is *damnum absque injuria*. (*City of Quincy v. Jones*, 76 Ill. 231; *Charless v. Rankin*, 22 Mo. 566; *Panton v. Holland*, 17 Johns. 92; *Shrieve v. Stokes*, 8 B. Mon. 453; *Railroad Co. v. Reaney*, 42 Md. 117; *Rockwood v. Wilson*, 65 Mass. 221; *McGuire v. Grant*, 1 Dutch. 356; *Radcliff's Executors v. Mayor, &c.*, 4 Comstock, 195; *Foley v. Wyeth*, 2 Allen, 131; *Washburn's Easements*, 521; 1 *Sutherland on Damages*, 3.)

There are numerous other authorities which go to the same extent, many of which are referred to in those that have been cited, and it is universally held in all that in cases like the present one, only reasonable care and diligence are required of

3. Excavation on
verge of lot;
damages.

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the party making the excavation. Where there is a building upon the adjoining lot which may be injured by the excavation, it would ordinarily be the duty of the party to give the owner of such building sufficient notice so that he might adopt means for its protection. Here the excavation was made for a proper purpose and not to an unusual depth, and whether it was done with ordinary care and diligence has been submitted to the jury and resolved in favor of the defendant. Both Winn and Abeles had ample notice that the excavation was to be made; and it may be remarked that the jury found that about the time the excavation was begun, Abeles proposed to Winn to put in a temporary wall that would prevent any damages in case the west wall of the building should fall, and that Winn refused to give his consent. He is therefore in no position to complain, and neither of the positions which he has advanced in argument can be sustained.

It is finally urged that the court erred in permitting Abeles to testify that he acted under the advice of E. T. Carr, who was an architect, in the steps taken to protect his building. The jury specially found that Mr. Carr was a skillful and competent architect, and also that the wall which was the subject of agreement between Abeles and Colyer, was reasonably necessary for the protection of the building occupied by Winn. In determining what action he should take to protect the building, it was proper for Abeles to consult a practical and skillful man who had had experience in such matters, and to regard his advice in the means employed to accomplish his purpose. The testimony complained of was therefore competent to prove that he acted with reasonable caution and with good faith in the steps taken by him.

We think there should be an affirmance of the judgment rendered by the district court, and it is so ordered.

All the Justices concurring.

JOHN R. GARDNER V. ISRAEL D. RISHER.

1. **UNLIQUIDATED DAMAGES, When a Set-Off.** Unliquidated damages arising from contract may constitute a set-off against a note secured by a chattel mortgage; and if such unliquidated damages exceed the mortgage debt, the mortgagee is not entitled to the possession of the property described in the mortgage, as against the mortgagor, asserting such unliquidated damages and pleading the same in an action founded upon the note and mortgage.
2. **SET-OFF, Not Defeated by Assignment.** When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other a set-off could have been set up, neither can be deprived of the benefit of such set-off by the assignment of the other. (Civil Code, § 100.)

Error from Butler District Court.

ACTION originally commenced and tried before a justice of the peace. The following is the plaintiff's bill of particulars, omitting name of justice and title:

"Plaintiff, Israel D. Risher, complains of the defendant, John R. Gardner, and says that the plaintiff is the owner of the following-described and valued property, to wit: One red cow, with some white in the face or forehead, said cow being a little more than five years old, and of the value of thirty-five dollars; that said plaintiff is entitled to the immediate possession of said cow; that said property is wrongfully detained from said plaintiff by said defendant, John R. Gardner; that said property was not taken in execution or on an order or judgment against plaintiff, or for payment of any tax, fine or amercement assessed against plaintiff, or by virtue of any order issued in replevin, or any other mesne or final process; that by reason of such unlawful detention of said property by defendant, this plaintiff has sustained damages in the sum of forty-five dollars. Wherefore, plaintiff prays judgment against defendant for the return of said property and for said damages, and for all other proper relief in the premises."

An appeal was taken to the district court, and trial had January 22, 1885, by the court, the parties waiving a jury.

35	93
36	55
39	312
35	93
45	196
35	93
52	114

Gardner v. Risher.

Upon the request of defendant, the court made and filed the following findings of fact:

"1. On the 25th day of February, 1884, plaintiff made and delivered to Herman Litzkie two notes for fifty-five dollars, due in two and six months respectively, and bearing interest at 12 per cent. per annum from date, and at the same time to secure the payment of these two notes made and delivered to said Herman Litzkie a mortgage upon the property replevied in this action, being a cow, which mortgage provided that if the said indebtedness should be paid when due, the mortgage should become void, and further provided that if the indebtedness was not paid when due, the mortgagee might take the property and sell it at public or private sale; and that until default should be made, the property should remain in the possession of the plaintiff.

"2. The plaintiff made payments upon said indebtedness as follows: On August 4, 1884, twenty-eight dollars; on September 29, 1884, twenty dollars; and on October 4, 1884, thirteen $\frac{68}{100}$ dollars.

"3. On or about the 20th day of February, 1884, the plaintiff and said Herman Litzkie entered into a contract whereby Litzkie agreed to furnish to plaintiff one hundred and fifteen head of cattle to be herded by plaintiff during the herding season of 1884, and to furnish to plaintiff a pony for herding purposes during such season, and furnish the necessary salt with which to salt said cattle during said season, and to pay plaintiff for herding said cattle the sum of fifteen cents per head per month for said season, and the plaintiff agreed to herd said cattle during said season for said compensation; that the herding season opened during the month of May, in 1884, and continued for about five months; that the plaintiff procured the use of extra pasture land and made other necessary arrangements for the herding of said cattle for said season; that plaintiff had a son capable of herding said cattle in connection with all other cattle plaintiff was herding for said season; that plaintiff engaged in herding cattle during the herding season of 1884, and could have herded said cattle of Litzkie under said contract without additional expense; that the said Herman Litzkie wholly failed to furnish plaintiff any cattle to be herded during any part of said season under said contract or otherwise; that the plaintiff sustained damages by reason of the breach of said contract on the part of said Litzkie in the sum of eighty-five dollars; that if said cattle had

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been furnished by Litzkie as agreed, the contract of herding by plaintiff would have been fulfilled before the taking of the property hereinafter stated.

"4. On or about the 6th day of October, 1884, the said Herman Litzkie took possession of said mortgaged property under and claiming the right so to do by virtue of said mortgage; that defendant Gardner was present with Litzkie at the time of such taking said property.

"5. At the time Litzkie took said mortgaged property as aforesaid in the presence of defendant Gardner, the plaintiff notified Litzkie that he considered said mortgage debt fully paid, and demanded the surrender of said notes and mortgage.

"6. Said Litzkie, claiming to act under the provisions of said mortgage, sold said property to defendant at private sale to satisfy said mortgage debt.

"7. The said property is of the value of thirty dollars.

"8. The value of the use of said property from the commencement of this action until this trial, is the sum of ten dollars.

"9. Except as affected by said mortgage and the proceedings thereunder, the plaintiff was the owner of said property at the time of this action."

Thereon the court made the following conclusions of law :

"1. The taking of the property by said Herman Litzkie under said mortgage, was unauthorized and wrongful.

"2. The sale of said property by said Herman Litzkie to defendant, John R. Gardner, was unauthorized and conveyed no title.

"3. The plaintiff is entitled to recover of the defendant in this action the property replevied and the sum of thirty dollars, in case a return of said property cannot be had; and the plaintiff is further entitled to recover of the defendant the sum of ten dollars, his damages for the detention of said property."

The defendant excepted to the findings of fact and conclusions of law, and filed a motion for judgment upon the findings of fact, which was overruled. He filed a motion for a new trial, which was also overruled. Judgment was entered upon the findings in favor of the plaintiff, that he recover from the defendant the personal property described in the bill of particulars, and in case a return of the property could not

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be had, that he recover \$30 for the value of the property. It was also adjudged that the defendant pay all costs. To the rulings and judgment the defendant excepted, and brings the case here.

T. O. Shinn, for plaintiff in error.

C. A. Leland, and *A. L. L. Hamilton*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This action originated in a justice's court. Subsequently, it was appealed to the district court, and there, upon the trial, the parties waived a jury and submitted the case to the court, with the request that the court find the facts specifically and state its conclusions of law thereon. This was done. The facts found are substantially these: On February 25, 1884, Israel D. Risher, plaintiff below, executed to Herman Litzkie two notes for fifty-five dollars, due in two and six months respectively, and bearing interest at twelve per cent. per annum from date; to secure the payment of these notes, Risher executed to Litzkie a mortgage upon a cow — the property replevied in this action — which provided, among other things, that if the indebtedness was not paid when due, the mortgagee might take the property and sell it at public or private sale. It was further provided therein that until default should be made, the property should remain in the actual possession of the mortgagor. Risher paid \$61.68 upon the notes. On February 20, 1884, Risher and Litzkie entered into a contract whereby Litzkie agreed to furnish to plaintiff 115 head of cattle to be herded by the plaintiff during the herding season of 1884; Litzkie wholly failed to furnish any cattle to be herded under his contract, and Risher sustained damages by reason of the breach thereof in the sum of \$85. On October 6, 1884, after such damages had accrued to Risher, Litzkie took possession of the cow embraced in the mortgage, claiming the right so to do by virtue thereof. At this time, Risher notified Litzkie that on account of the damages which

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had accrued to him by reason of the breach of the contract before mentioned, the mortgage debt was fully satisfied, and thereupon he demanded the surrender of the notes and mortgage. Litzkie refused to assent to the claim of Risher, but sold the property, which was of the value of \$30, at private sale, to John R. Gardner, the defendant below, who was present when Litzkie took the mortgaged property and had notice from Risher that he was the owner of the cow, and that the mortgage debt was satisfied as above stated. Subsequently, Risher brought his action in replevin against Gardner to obtain possession of the cow.

The \$61.68 which Risher had paid upon the notes secured by the mortgage, together with the \$85 claimed by him as damages by reason of the breach of the contract upon the part of Litzkie, greatly exceeded the balance due upon the notes and mortgage. The question in the case therefore is, whether Risher had the right to off-set against the notes and mortgage the damages he claimed against Litzkie. We think he had the right to off-set his damages, and that Litzkie acted at his peril in taking the cow. The only claim he had to the cow was under the mortgage, and his interest in the property depended upon the amount due him from the mortgagor, after deducting all payments and legal off-sets. His claim, therefore, was founded on contract, and in this state any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, constitutes a set-off against any action founded on contract. (Civil Code, §§ 94, 98; *Stevens v. Able*, 15 Kas. 584.) The law relating to set-offs in this state has been broadened to embrace claims not recognized as such by the laws of many other states; hence, the cases of *Gates v. Smith*, 2 Minn. 30; *Keightley v. Walls*, 24 Ind. 205; and *Warner v. Comstock*, 22 N.W. Rep. 664, do not apply.

Gardner purchased the cow with notice of Risher's rights. His defense, or rather his claim, in the action was founded upon the notes and mortgage executed by Risher to Litzkie. If nothing was due upon the notes and mortgage, or if Risher

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had a valid off-set to the same at the time Litzkie took possession of the cow, then Gardner obtained no title or right thereto, if Risher's set-off was relied upon and pleaded by him in any action or proceeding founded upon the notes and mortgage. Section 100 of the civil code provides:

"When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other; but the two demands must be deemed compensated so far as they equal each other."

(*Levenson v. Lafontaine*, 3 Kas. 523; *Turner v. Crawford*, 14 id. 499; *Sponenbarger v. Lemert*, 23 id. 55.) So here,

Risher cannot be deprived of the benefit of his set-off on account of the sale or transfer of the mortgaged property to Gardner, who had full knowledge of Risher's set-off at the time he purchased.

The judgment of the district court will be affirmed.

VALENTINE, J., concurring.

JOHNSTON, J.: I do not concur. Under our statutes a set-off can only be pleaded in an action founded on contract. (Civil Code, § 98.) This was an action of replevin, which is in the nature of a tort, and is founded upon the wrong of the defendant and not upon contract. I think, therefore, that the adjudication of a claim between the plaintiff and defendant's vendor in this action was erroneous.

2. Set-off, not
defeated by
assignment.

35	90
35	106
30	408
30	400

In the matter of the Petition of WILLIAM T. EDWARDS for a writ of Habeas Corpus.

1. **HABEAS CORPUS—Discharge of Prisoner, Not by Supreme Court.**

Where a prisoner is held to answer for a criminal offense, and the district court refuses to grant his application for discharge, made by him under the terms of § 221 of the criminal code, and instead thereof remands him to jail until bail is given, the order of the court cannot be reviewed or reversed, or the prisoner discharged, by a proceeding in *habeas corpus* before the supreme court.

2. **DISCHARGE OF DEFENDANT—No Error in Denying Motion.**

Where an information was filed against E. for the offense of murder, one day prior to the commencement of the regular term of the district court for 1885, and at such May term of the court, against the objection of the state and the defendant, the court attempted to remove the case for trial to another county, in another judicial district, upon the ground that the judge was disqualified to preside, on account of his prejudice, and such defendant was held to answer on bail to the district court of such other county, and thereafter the September and November terms of the district court where the information was filed were held, without the defendant being tried, and in December the jury were discharged, in his absence, but while his attorneys were present, who refused to appear or answer in any way for him, and the defendant did not at any one of the terms of said court ask or announce himself ready for trial, but made application on the last day of the November term of the court for his discharge, because he had not been brought to trial within the time limited in § 221 of the criminal code, *held*, that the court committed no error in denying the motion, as the state announced itself ready to proceed at once with the trial, and the court decided that there was not time, during the remainder of the term of court, for the trial of the case upon its merits.

Original Proceedings in Habeas Corpus.

PETITION for a writ of *habeas corpus*, filed in this court on February 9, 1886, on behalf of *William T. Edwards*, who is charged with murder in the first degree in killing one John Wilson, on December 6, 1884. The petition, among other things, shows that on January 2, 1886, the petitioner made a written application to the district court of Sumner county, verified by his oath, to be discharged from custody, and therein

In re Edwards, Petitioner.

alleged, among other things, that the information charging him with the offense of murder in the first degree was filed in the district court of that county on May 4, 1885, one day prior to the commencement of the regular May Term for 1885 of that court; that said May Term was finally adjourned on August 17, 1885, without the petitioner having been brought to trial, and without his having made application for or having consented to a continuance of the action; that the next regular term of that court commenced on September 1, 1885, and was finally adjourned on October 3, 1885, without the petitioner having been brought to trial, and without his having applied for or consented to a continuance; that the next and third regular term of that court, after the filing of the information, commenced on November 3, 1885, and continued for the transaction of business up to and inclusive of December 12, 1885, when the court was adjourned to January 2, 1886, (the regular December Term of the district court of Comanche county having intervened, the same commencing on December 15, 1885, and ending during the same month,) without the petitioner having been brought to trial, and without his having applied for or consented to any continuance. Said application further alleged that from and after the commencement of the regular November Term of the district court of Sumner county for 1885, up to and including the date of its adjournment on December 12, 1885, the court had ample time to have fully tried said cause, and that the court actually had ample time to have done so between November 3, 1885, and December 12, 1885, as shown by the journal and records thereof.

Upon the hearing of the application for discharge, the court made the following findings of fact:

“That the state of Kansas, by its said attorneys, has on this day, and since the filing and presentation of said application of said defendant for the consideration thereof by the court here, announced itself ready to proceed with the trial of said cause upon its merits; but the court further finds that there is not now time, during the period allowed by law, for the trial of said cause upon its merits at the present term,

Statement of the Case.

owing to the fact that this is the last day of the week, commonly called Saturday, and that on the next ensuing Tuesday, to wit, the 5th day of January, 1886, the district court of Harper county, in the same (the 19th) judicial district, in the state of Kansas, is required by law to convene in regular term; and further, that the regular panel of the jury for this term of this court were each and all, on the 12th day of December, 1885, excused and discharged, (but without the consent or objection of said defendant, he not being present, either in person or by attorney, but then being on bail to appear before the district court of Cowley county, Kansas, on the first day of the regular December, 1885, term thereof, to answer the charge contained in and by the information filed in this action against him, which had prior thereto, and over and against the protest and objections of said defendant, been erroneously by this court, of its own motion, attempted to be transferred to said last-named court for trial,) from further attendance upon this court for this term; and owing to the further fact that no witnesses have been subpoenaed on behalf of the state to appear and testify at this term in this cause. And the court further finds that on the 12th day of December, 1885, at the present term of this court, the state of Kansas, by its attorney, John A. Murray, county attorney of said Sumner county, filed its motion to have the order of this court changing, or attempting to change, the venue for the trial of this action to the district court of Cowley county, in the 13th judicial district in the state of Kansas, vacated and set aside, to the end that said cause might be remanded to this court for trial, in accordance with the law of the land; and that pending the hearing of said motion, the defendant not being personally present in court, the attorneys who had theretofore appeared for said defendant, and who now appear for him in this court, Messrs. Herrick, George & King, and McDonald & Parker, each and all being personally present, were, each and all, specifically interrogated touching the matter, by the court, and said attorneys, each and all, answered that they did not, nor either or any of them, then appear in this court for or on behalf of said defendant for any purpose whatsoever."

Thereon, the court found that the petitioner was not legally entitled to be discharged as by him demanded. The court further ordered the case to be continued for trial at the next regular term of court, and that the petitioner be required to

In re Edwards, Petitioner.

enter into bail in the sum of \$7,000 for his appearance at said term of the district court to answer the charge alleged against him. Thereupon, the petitioner objected and excepted. On March 3, 1886, the sheriff of Sumner county made return to the writ of *habeas corpus* issued, that he restrained the petitioner of his liberty and retained him in custody by virtue of a warrant issued out of the district court of Sumner county upon the information filed in that court on May 4, 1885, charging the petitioner with murder in the first degree.

George, King & Caldwell, and *McDonald & Parker*, for petitioner.

S. B. Bradford, attorney general, and *John A. Murray*, county attorney, for The State.

The opinion of the court was delivered by

HORTON, C. J.: The petitioner claims that he is entitled to his discharge under the provisions of § 221 of the criminal code, which reads:

“If any person, under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending, which shall be held after such indictment found or information filed, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happened on his application, or be occasioned by the want of time to try such cause at such third term.”

We do not think the proceeding by *habeas corpus* the proper remedy in this case. The petitioner alleges that the district court refused his application to be discharged under the provisions of § 221 of the criminal code, and remanded him to custody until he should give bail, and continued the cause for trial. The order of the district court, until reversed, is valid, and sufficient authority for the retention of the petitioner in custody. We cannot, in a proceeding of this character, review or reverse an order or judgment of the district court, having juris-

1. *Habeas corpus*; prisoner, not discharged by supreme court.

Opinion of the Court.

diction, when such order is neither void, nor in excess of its authority. (Civil Code, § 671 ; *Ex parte McGehan*, 22 Ohio St. 442.) The statutes construed in the cases of *Brooks v. People*, 88 Ill. 327, and *In re Garvey*, 4 Pac. Rep. 758, do not provide for any discharge of the offense, but operate merely to set the prisoner at liberty. In this state, the statute provides for the absolute discharge of the prisoner from the offense, and therefore Illinois and Colorado decisions are not applicable.

In the case of *In re Dill*, 32 Kas. 668, the petitioner was guilty of no offense, and the judgment rendered against him was void. In that case, he was released from imprisonment upon that ground. But waiving the irregularity of this proceeding, we think the ruling of the district court was correct. The information was filed against the petitioner one day prior to the commencement of the May term of the district court of Sumner county for 1885. At the

2. Discharge of defendant, no error in denying.

May term, against the objection of the state and the petitioner, the court attempted to remove the case for trial to Cowley county, in another judicial district, upon the ground that the judge was disqualified to preside at the trial on account of his prejudice. This order was vacated upon the motion of the county attorney of Sumner county, on December 12, 1885. The regular terms of the district court of Sumner county for 1885 were held as follows: The first Tuesdays of May, September, and November. On account of the intervention of the district court of Comanche county, the November term of the district court of Sumner county was adjourned from December 12, 1885, to January 2, 1886, at which time the application for the discharge of this petitioner was presented. After the presentation of such application, the state announced itself ready to proceed at once with the trial. The court, however, in its findings of fact, states that there was not time during the period allowed by law for the holding of the November term of court, for the trial of the case upon its merits. The state was not responsible for the discharge of the jury, or the adjournment of the court on Decem-

In re Edwards, Petitioner.

ber 12, 1885, and we must assume that when it announced itself ready for trial on January 2d, whether any witnesses had been subpoenaed, or not, in behalf of the state, it was capable of producing them if allowed so to do. The statute expressly provides that if the delay to bring a prisoner to trial be occasioned by the want of time to try his cause, the court is not bound to discharge him. (See also § 222, Crim. Code.) In several states, as above referred to, statutes similar to ours operate merely to set the prisoner at liberty; but our statute provides, in effect, an acquittal, if the defendant is not brought to trial within the time therein prescribed. Therefore there is good reason for holding that a prisoner ought not to be entitled to his discharge unless he brings himself within the spirit of the statute. The section quoted was designed to shield the innocent from oppression, but not to enable the guilty to escape. (*Steward v. State*, 13 Ark. 720.) In *Clark v. Commonwealth*, 29 Pa. St. 129, it was decided, concerning a similar statute, that "it was made to restrain the malice and oppression of prosecutors, and to relieve wrongful imprisonment; not to embarrass the administration of criminal law; not to relieve righteous imprisonment and to defeat public justice." In *Steward v. State*, supra, the court construed a similar statute to mean that the prisoner was entitled to his discharge only where the delay of the state in bringing him to trial was for want of evidence; and that within the spirit of the law, the prisoner, to be entitled to his discharge for want of prosecution, must place himself on the record in the attitude of demanding a trial, or at least of resisting postponement.

On December 12, 1885, when the jury were discharged, the petitioner was not present, being on bail to appear before the district court of Cowley county, but his attorneys were all in the court, and when specifically interrogated concerning the case by the court, refused to appear or answer in any way for their client. During the several terms of the district court of Sumner county, held since the filing of the information, the petitioner has not announced himself ready for trial at any of

The State v. Edwards.

the terms thereof. He has not seemed anxious for any hearing of the case against him upon its merits, but has only desired a discharge, without any trial.

The petitioner will be remanded.

All the Justices concurring.

THE STATE OF KANSAS V. WILLIAM T. EDWARDS.

1. **CRIMINAL CASE—Appeal, When.** An appeal in a criminal action can be taken by a defendant only after judgment, and an intermediate order of which he complains can be reviewed only on such an appeal. (*Cummings v. The State*, 4 Kas. 225; *The State v. Freeland*, 16 id. 9.)
2. ——— **No Appeal, When.** An appeal will not lie from an order of the district court refusing an application of a defendant charged with a criminal offense, for his discharge, under the provisions of § 221 of the criminal code, where the court remands the defendant into custody until he gives bail, and continues the case against him for trial at the next regular term. (*The State v. Horneman*, 16 Kas. 452.)

Appeal from Sumner District Court.

The facts appear in *In re Edwards*, just decided.

George, King & Caldwell, and *McDonald & Parker*, for appellant.

S. B. Bradford, attorney general, and *John A. Murray*, county attorney, for The State.

The opinion of the court was delivered by

HORTON, C. J.: The complaint in this case is, that the district court erred in refusing to discharge the defendant, under the provisions of § 221 of the criminal code. Instead of granting the application made, the court remanded the defendant to custody until he should give bail, and ordered the case to be continued for trial at the next regular term. There-

35	105
39	400

35	105
66	751

35	105
73	738

 Rose v. Hayden.

fore, the cause is still pending. A defendant in a criminal case can only appeal after judgment against him, that is, after final judgment; and intermediate orders can be reviewed only on such an appeal. The order refusing a discharge is not a final judgment. The appeal is premature, and must be dismissed. (Criminal Code, §§ 281, 282; *Cummings v. The State*, 4 Kas. 225; *The State v. Freeland*, 16 id. 9; *The State v. Horneman*, 16 id. 452.) If we were to pass, however, upon the merits of the case, under the authority of *In re Edwards*, just decided, the order of the district court would have to be affirmed.

All the Justices concurring.

35	106
37	309
38	101
35	106
45	735

 E. D. ROSE V. CHARLES HAYDEN.

PRINCIPAL AND AGENT; *Statute of Frauds*; *Resulting Trust*. Where a person desiring to purchase a piece of land employs by parol a firm of land agents to negotiate for the purchase of the land for him, and the member of the firm who does the business commences such negotiations, but finally, and in violation of his duties as agent, purchases the property for himself, with his own money, and takes the title thereto in his own name; and afterward the principal tenders to the agent an amount of money equal to the purchase-money, and an additional amount sufficient to compensate the agent for all his services, and also tenders a deed for the land for the agent to execute to the principal, and demands of the agent that he shall execute the same, but the agent refuses, and claims to own the land himself, held, under these facts, and by operation of law, that the agent holds the legal title to the land in trust for his principal; that the principal holds the paramount equitable title thereto, and by keeping his tender good may recover the property in an action in the nature of ejectment; and this notwithstanding the statute of frauds, and the fact that the employment of the agent was only in parol, and the further facts that the principal did not advance the purchase-money, and has never been in the possession of the property, nor made any improvements thereon; that the case is not one of the creation of an express trust either by parol or in writing, nor one of the express transfer of any interest in real estate either by parol or in writing, but is simply a

Opinion of the Court.

case of resulting trust, brought into existence by the operation of law upon the facts of the case; and that the case does not come within the statute of frauds; and that the authority of the agent for the purpose for which he was employed need not be in writing.

Error from Jackson District Court.

EJECTMENT, brought by *Hayden* against *Rose*. Trial by the court, at the July Term, 1884, and judgment for plaintiff. The defendant brings the case to this court. The opinion states the material facts.

J. H. Keller, for plaintiff in error.

Hayden & Hayden, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by Charles Hayden against E. D. Rose for the recovery of lots numbered 100 and 102, on Wisconsin avenue, in the city of Holton. The case was tried before the court, without a jury, and the court made a general finding in favor of the plaintiff and against the defendant, and rendered judgment accordingly; and to reverse this judgment the defendant brings the case to this court.

In the court below the plaintiff claimed to hold the absolute title, legal and equitable, to lot No. 100, and claimed to hold the paramount equitable title to lot No. 102, admitting that the defendant held the legal title to that lot, but claiming that the defendant held such title in trust for the plaintiff; on the other side the defendant claimed to hold the entire title, legal and equitable, to both the lots. The facts of the case appear to be substantially as follows: In September, 1883, Mary Dihle owned the patent title to both the lots in controversy, and the plaintiff, desiring to purchase the same, employed as his agents in the negotiations therefor the defendant and J. H. Chrisman, who were partners doing business at Holton, Kansas, as real estate agents, under the firm-name of Rose & Chrisman. Pursuant to this employment, Rose & Chrisman wrote to Mrs. Dihle, and ascertained that her price for the

Rose v. Hayden.

lots was \$150, which fact they reported to the plaintiff. In the meantime the plaintiff had learned that there was an outstanding tax title on lot No. 100, which fact he communicated to his agents, Rose & Chrisman, and instructed them to write again to Mrs. Dihle, informing her of that fact, and instructed them to ascertain from her whether she would not take less than \$150 for her title to the lots. This they agreed to do. The entire agreement between the plaintiff and Rose & Chrisman was in parol. The plaintiff then purchased the outstanding tax title to lot No. 100, and had the deed therefor executed to S. K. Linscott, and the plaintiff then left the state and was absent for about three weeks. On his return he called upon the defendant, Rose, to ascertain what had been done concerning the lots, and Rose then informed him that he had purchased the lots for himself, taking the deed therefor in his own name, and had paid therefor \$85. The plaintiff then informed Rose that he owned the outstanding tax title on lot No. 100; that although the title was in Linscott's name, yet that Linscott had no real interest therein, but simply held the title to the lot for the benefit of the plaintiff. The plaintiff then tendered to Rose \$110, and also tendered to him a deed, and demanded that he should convey the title to the lots to the plaintiff; but Rose refused. Afterward, and on October 30, 1883, Linscott executed a quitclaim deed for lot No. 100 to the plaintiff, and the plaintiff then brought this action for the recovery of both the lots. The plaintiff has at all times kept his tender good.

In this state, the action of ejectment is an equitable remedy as well as a legal remedy, and in such action the party holding the paramount title, whether legal or equitable, or both, or partly one and partly the other, may recover. The only question, then, for us to consider in this case is, which has the paramount title to the property in controversy—the plaintiff, or the defendant? That the defendant with his partner was the agent of the plaintiff to carry on negotiations for the purchase of the lots in controversy for the plaintiff, there can be no question, and but little question

Ejectment; nature of action.

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as to the nature and character of the agency. The defendant, with his partner, was simply to carry on negotiations for the purchase of the lots, under the directions and instructions of the plaintiff and for the plaintiff. Under such circumstances, could the defendant purchase the property for himself, in his own name and with his own money, and take the title to

Agent, trustee
for principal.

himself, without becoming a trustee for the plaintiff, at the option of the plaintiff, and holding the legal title to the property merely in trust for the plaintiff, and until the plaintiff should repay him the amount which he had expended in the purchase of the property and reasonable compensation for his services? Except for the statute of frauds, which we shall hereafter consider, we think he could not. (*Krutz v. Fisher*, 8 Kas. 90; *Fisher v. Krutz*, 9 id. 501; *Lees v. Nuttall*, 1 Russ. & M. Ch. 53; same case, on appeal, 2 Myl. & K. Ch. 819; *Taylor v. Salmon*, 4 Myl. & Cr. Ch. 134; *Heard v. Pilley*, 4 Ch. Ap. L. R. 548; *Massie v. Watts*, 10 U. S. 148; *Winn v. Dillon*, 27 Miss. 494; *Wellford v. Chancellor*, 5 Gratt. 39; *Church v. Sterling*, 16 Conn. 384; *Rhea v. Puryear*, 26 Ark. 344; *Sweet v. Jacocks*, 6 Paige's Ch. 355, 364; *Matthews v. Light*, 32 Me. 305; *McMahon v. McGraw*, 26 Wis. 615; *Barziza v. Story*, 39 Tex. 354. See also the various cases hereafter cited.)

But can the statute of frauds make any difference? Under the authorities cited by the defendant, plaintiff in error, he claims that it not only can but does. Under such authorities he claims that the plaintiff has no remedy and is not entitled to any relief. The following are the principal authorities cited by the defendant: 2 Sugden on Vendors, ch. 21, § 1, ¶ 15, 8 Am. ed. from the 14 Eng. ed.; 2 Story on Eq. Jur., § 1201a; *Bartlett v. Pickersgill*, 1 Eden, 515; same case, 4 East, 577, in note to *King v. Boston*; *Burden v. Sheridan*, 36 Iowa, 125; *Allen v. Richard*, 83 Mo. 55; *Botsford v. Burr*, 2 Johns. Ch. 405; *Nixon's Appeal*, 63 Pa. St. 279; *Steere v. Steere*, 5 Johns. Ch. 1; *Perry v. McHenry*, 13 Ill. 227; *Walter v. Klock*, 55 id. 362; *Watson v. Erb*, 33 Ohio St. 35; *Pinnock v. Clough*, 16 Vt. 500; *Hidden v. Jordan*, 21 Cal. 92.

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Under the authorities cited by the plaintiff, it is claimed that the statute of frauds makes no difference. It is claimed that with or without the statute of frauds a trust resulted by operation of law in favor of the plaintiff, and that the defendant simply holds the legal title to the property in trust for the plaintiff. The principal authorities cited by the plaintiff, in addition to those which we have already cited for him, are the following: *Chastain v. Smith*, 30 Ga. 96; *Cameron v. Lewis*, 56 Miss. 76; *Gillenwaters v. Miller*, 49 id. 150; *Sandford v. Norris*, 4 Abb. (N. Y.) App. Dec. 144; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Wood v. Rabe*, 96 N. Y. 414; *Burrell v. Bull*, 3 Sandf. (N. Y.) Ch. 15; *Bennett v. Austin*, 81 N. Y. 308; *Hargrave v. King*, 5 Ired. (N. C.) Eq. 430; *Kendall v. Mann*, 93 Mass. 15; *Jackson v. Stevens*, 108 id. 94; *McDonough v. O'Niel*, 113 id. 92; *Sandfoss v. Jones*, 35 Cal. 481; *Snyder v. Wolford*, 33 Minn. 175; *Soggins v. Heard*, 31 Miss. 426; *Seichrist's Appeal*, 66 Pa. St. 237; *Peebles v. Reading*, 8 Serg. & R. 484; *Onson v. Cown*, 22 Wis. 329; *Bryant v. Hendricks*, 5 Iowa, 256; *Bannon v. Bean*, 9 id. 395; *Judd v. Moseley*, 30 id. 424; *Jenkins v. Eldredge*, 3 Story, U. S. C. C., 183, 288 to 290; *Baker v. Whiting*, 3 Sumner, 476, 482, *et seq.*; *Rothwell v. Dewees*, 67 U. S. 613; *Cave v. Mackenzie*, 46 L. J. Ch. Div. 564; 37 L. T. N. S. 218; Fisher's Eng. Digest for the year 1877, 400; *McCormick v. Grogan*, 4 Eng. & Irish Appeals, L. R. 97; *Bond v. Hopkins*, 1 Sch. & Lef. (Eng.) 433; *Dale v. Hamilton*, Hare's Ch. (Eng.) 369.

The statute of frauds upon which the defendant relies will be found in §§ 5 and 6 of the act of the legislature of Kansas relating to frauds and perjuries. The statute, so far as it is necessary to quote it, reads as follows:

"SEC. 5. No leases, estates, or interests, of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing, or by act and operation of law.

"SEC. 6. No action shall be brought whereby to charge a party, . . . upon any contract for the sale of lands, ten-

ements, or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

The statute relating to trusts and powers, so far as it is necessary to quote it, reads as follows:

"SEC. 1. No trust concerning lands, *except such as may arise by implication of law*, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

The statute relating to conveyances, so far as it is necessary to quote it, reads as follows:

"SEC. 8. Declarations or creations of trust or powers, in relation of real estate, must be executed in the same manner as deeds of conveyance; *but this provision does not apply to trusts resulting from the operation or construction of law.*"

It will be seen from a reading of § 5 of the act relating to frauds and perjuries, § 1 of the act relating to trusts and powers, and § 8 of the act relating to conveyances, that all interests in real estate which may arise or be created "by act and operation of law," or which "may arise by implication of law," and "trusts resulting from the operation or construction of law," are not within the statutes requiring a writing for the creation of interests in real estate; and hence it would seem that these statutes cannot apply to the present case; for the plaintiff in the present case does not claim to have any interest in the real estate in controversy, except such as arises by operation of law. He does not claim any interest in the real estate in controversy by virtue of *the express terms* of any contract, written or oral. There was no contract, written or oral, that purported to transfer the property, or any interest therein, to the plaintiff. Nor did the plaintiff employ the defendant to take or hold the title to the property, either for the plaintiff or for the defendant, nor with or without the defendant's own money. He simply employed the defendant by a simple parol contract to negotiate for the purchase of the real estate

Rose v. Hayden.

for the plaintiff, and of course the plaintiff expected to pay for it himself, and to take the title to himself, and to take such title by a formal and valid written instrument; and when the defendant took the title in the defendant's own name, instead of following the terms of the contract between himself and the plaintiff, he violated the terms of his contract, and abused the confidence reposed in him by the plaintiff. Under the contract as it was actually made, (and it was a parol contract which did not in terms give the property to the plaintiff,) and under the facts and circumstances connected with the contract, and with the parties to the contract before and afterward, and with the property in dispute, all that the plaintiff claims is merely that which results to him through the operation of law. We think it is

Statute of frauds,
case not within.

clear that § 5 of the statute of frauds cannot apply to this case. But can § 6 of the statute of frauds so apply? It is difficult to see how even § 6 can apply. The contract between the plaintiff and the defendant, constituting the defendant the agent of the plaintiff, was not "a contract for the *sale* of lands, tenements or hereditaments, or any interest in or concerning them," but it was simply a contract making the defendant *an agent* to negotiate for the *purchase* of lands, tenements and hereditaments, and interests in and concerning them; and while § 5 of the statute, which contemplates an absolute transfer of an interest in real estate, requires that the authority of an agent, empowered to transfer the same, shall be in writing, yet § 6 of the statute, which merely contemplates a *simple contract* for the future transfer of some interest in real estate, does not require that the authority of the agent shall be in writing. There is a marked distinction between the language of the two sections. Even a contract giving authority to an agent to make a contract for the *sale* of real estate need not be in writing, under § 6. (1 Reed on Statute of Frauds, § 379, and cases there cited; *Rottman v. Wasson*, 5 Kas. 552; *Buller v. Kaulback*, 8 id. 669, 675, 676; *Ayres v. Probasco*, 14 id. 187, 188.) And certainly a contract authorizing an agent to make a contract for the *purchase* of real

Opinion of the Court.

estate need not be in writing. In our opinion, neither § 5 nor § 6 of the statute of frauds can apply to this case.

The principal defect, as we think, in the reasoning of the defendant, is in his not making any distinction between trusts or interests in real estate which are *expressly created* by the terms of the parol contract itself, and trusts or interests which arise from facts and circumstances which sometimes include a parol contract, but which arise from such facts and circumstances only by implication or operation of law; and the authorities which he cites are, so far as they are applicable to this case, and so far as they maintain the doctrine which he urges, alike defective; and indeed, we do not think that they truly state the law. The defendant and his authorities also make the mistake of supposing that the statute of frauds may be used as an instrument of fraud. Such was not the intention of the legislature. The intention of the legislature in enacting the statute was to prevent fraud, and the statute should be enforced in its spirit and not merely as to its letter.

The first and leading case upon which the doctrine of the defendant rests is the case of *Bartlett v. Pickersgill*, reported in 1 Eden, 515, and 4 East, 577; but the authority of that case has been denied, and we think overruled, even in England. It was decided in 1760, and in 1829 it was held, in the case of *Lees v. Nuttall*, 1 Russ. & M. Ch. 53, that "if an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal." And this case was affirmed in 1834, in *Lees v. Nuttall*, 2 Myl. & K. Ch. 819; and this was a case where the agency was created wholly and entirely by parol. In the case of *Heard v. Pilley*, 4 Ch. Ap., L. R., 548, 552, which was decided in 1869, it was held that "a contract for the purchase of land made by an agent will be enforced, although the agent be appointed merely by parol;" and in that case Lord Justice Selwyn used the following language:

"I cannot at all accede to the argument urged in reply, that under these circumstances when the agent goes to the principal and says, 'I will go and buy an estate for you,' it is not a

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fraudulent act on his part afterward to buy the estate for himself and to deny the agency. I think that would be an attempt to make the statute of frauds an instrument of fraud."

In the same case Lord Justice Gifford used the following language:

"I cannot help adding, as regards the case of *Bartlett v. Pickersgill*, that it seems to be inconsistent with all the authorities of this court which proceed on the footing that it will not allow the statute of frauds to be made an instrument of fraud."

In the case of *Bond v. Hopkins*, 1 Schoales & L. 433, which was decided in 1802, the Lord Chancellor uses the following language:

"The statute of frauds says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it, and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief."

In the case of *Cave v. Mackenzie*, above cited, which was decided in 1877, it was held that—

"A contract for the purchase of land made by an agent in his own name, vests the equitable estate in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol."

See also the other English and Irish cases above cited. On the other hand, Mr. Sugden, in his work on Vendors, vol. 2, ch. 21, § 1, ¶ 15, 8th Am. ed., from the 14th Eng. ed., follows the case of *Bartlett v. Pickersgill*, and uses the following language:

"Where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase-money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds."

Upon the authority of Mr. Sugden, and the case of *Bartlett v. Pickersgill*, Mr. Story, in his work on Equity Jurispru-

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dence, vol. 2, § 1201a, uses very nearly the same language as Mr. Sugden. Mr. Story's statement was inserted in his work on Equity Jurisprudence as early as 1843, and it may have been inserted therein at an earlier period of time. And while it may be good law as long as it is confined to *parol express trusts*, it cannot be good law if it be extended to trusts arising merely by implication or operation of law. The objection to this statement is that its language is too broad and covers cases which cannot properly come within its terms. The following from Mr. Story, enunciated by him at a later period of time, more truly states the law. In 1844, Mr. Story, as judge of the U. S. circuit court for the first circuit, and in the case of *Jenkins v. Eldredge*, 3 Story, 289, 290, uses the following language:

"It appears to me that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection, that the trust is void, as being by *parol*. The very confidential relation of principal and agent has been treated as for this purpose, a case *sui generis*. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even when the agency itself may be, nay, must be, proved only by *parol*. *Bartlett v. Pickersgill*, (1 Eden, R. 515;) S. C. 1 Cox R. 15; 4 East, R. 577n, and *Leman v. Whitley*, 4 Russ. R. 423, are, I admit, against this doctrine,—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then *Lees v. Nuttall* (1 Russ and Mylne, R. 53) expressly decides, that if an agent employed to purchase an estate, purchase for himself, and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by *parol*, and the purchase was from a third person. *Carter v. Palmer* (11 Bligh, R. 397, 418, 419) goes the full length of the same proposition."

Also, Mr. Browne, in his work on Frauds, § 96, uses the following language:

"It seems to have been held that where, in a case of trust arising upon an agency, the defendant's answer denied the fact of agency, *parol* evidence was inadmissible to prove it; but the later English cases favor a contrary doctrine."

(See also Browne on Frauds, § 84.)

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In the case of *Chastain v. Smith*, 30 Ga. 96, 97, it was held that—

“Where one person agrees, as agent, to buy land for another as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of law, and the case is not within the statute of frauds, resulting trusts being expressly excepted from the operation of the statute.”

. And Mr. Justice Stephens, in delivering the opinion of the court, uses the following language:

“The only question presented in this case is, whether or not the statute of frauds is in the way of the specific performance prayed by Mr. Chastain. In the first place, this case was never within the statute of frauds. The substance of the agreement, so far as that particular part of the land to which Mr. Chastain seeks a title is concerned, is that the Smiths would, *as his agent, buy it for him*. They did, in fact, buy it, but took a title to themselves. This title in their hands was immediately affected with a resulting trust for his benefit by operation of law. Now, a trust raised, or resulting by operation of law, is expressly excepted from the operation of the statute, and this case therefore was not within the statute from the beginning.”

In the case of *Wood v. Rabe*, 96 N. Y. 414, 425, Judge Andrews, in delivering the opinion of the court, uses the following language:

“There are two principles upon which a court of equity acts in exercising its remedial jurisdiction, which taken together, in our opinion, entitle the plaintiff to maintain this action. One is that it will not permit the statute of frauds to be used as an instrument of fraud; and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. . . . The principle, that when one uses a confidential relation to acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds.”

It seems to be admitted by the defendant, and also by the authorities which he cites, that where the principal advances

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the purchase-money to the agent, and the agent then purchases the property in his own name and for himself, a trust would result in favor of the principal, and the agent would hold the property merely in trust for the principal. But the defendant claims, and the authorities cited by him seem to sustain him, that as the plaintiff in this case did not advance any of the purchase-money, and that as the defendant purchased the property with his own money, no such resulting trust has arisen or could arise. Of course where the purchase-money is advanced by the principal to the agent, and the agent then purchases the property with his principal's money, and in his own name, it makes out a stronger case of resulting trust than where the agent himself advances the purchase-money; but the fact that the principal advances the purchase-money cannot be the controlling fact in the case. Many authorities hold that where the agent furnishes the purchase-money with the consent of the principal, it will be considered as a loan, and the agent will hold the property purchased in trust for his principal, and as a security to himself for the money advanced by him. (*Kendall v. Mann*, 93 Mass. 15; *Sandfoss v. Jones*, 35 Cal. 481; *Soggins v. Heard*, 31 Miss. 426.) Also, in many cases, the principal may have an interest in the property before he employs the agent to make the purchase, and may simply employ the agent to purchase for the principal an outstanding adverse title, for the purpose of bolstering up or protecting the principal's own title. This outstanding adverse title may be very good or very bad; but whether good or bad, the doctrine cannot at all be tolerated that the agent may, in violation of his duties as agent, purchase for himself the outstanding adverse title, and hold the same adversely to his principal, merely because his principal has not advanced the purchase-money, when, in fact, at the time of the employment of the agent the amount of the purchase-money could not be at all known. The question of the advancement of purchase-money in such a case should not have much weight. And in this connection it might be well to remember that the plaintiff in this case had an interest in the property in controversy at

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the time when the defendant purchased the same, although it is possible that the defendant may not have known of such interest. The plaintiff held a tax title in the name of S. K. Linscott, on one-half of the property in controversy, to wit, on lot No. 100, at the time the defendant purchased the two lots. And here the question may arise: Is it material whether the defendant did have any knowledge of the plaintiff's interest in the property, or not? Was the plaintiff bound to divulge his interest in the property to his agent, in order to protect his own rights and interests as against his own agent, and to prevent his own agent from acting adversely to him, and from perpetrating a fraud upon him? This question must certainly be answered in the negative. The principal is entitled to the services which the agent has agreed to perform, without divulging to the agent all his reasons and the necessities which prompted him to make the employment. A contract which has for its object the *actual sale* of real estate and the *transfer of the title* thereto by the terms of the contract itself, is of course within the statute of frauds, and it is generally held in such a case that the payment of the purchase-money alone cannot take the contract out of the statute of frauds. (4 Kent's Com., p. 451, Browne on the Statute of Frauds, § 461.) In such a case, the payment of the purchase-money does not seem to count for much. Something else must be done in order to take the contract out of the statute. And we do not think that the payment or non-payment of the purchase-money in this case should count for much. We think the trust nevertheless resulted. The controlling question in this case is not whether the principal advanced the purchase-money or not, but it is whether in equity and good conscience the agent who in fact purchased the property with his own money in his own name, in violation of his agreement with his principal and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot. (*Sandford v. Norris*, 4 Abb. N. Y. Ct. of App. 144; *Wellford v. Chancellor*, 5 Gratt. 39; *Onson v. Cowen*,

Resulting trust.

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22 Wis. 329; *Winn v. Dillon*, 27 Miss. 494; *Cameron v. Lewis*, 56 id. 76; *Gillenvouters v. Miller*, 49 id. 150; *Chastain v. Smith*, 30 Ga. 96; *Heard v. Pilley*, 4 Ch. App. L. R. 548; *Lees v. Nuttall*, 1 Russ. & M. Ch. 53; same case, affirmed on appeal, 2 Myl. & K. Ch. 819; *Taylor v. Salmon*, 4 Myl. & C. Ch. 134; *Cave v. Mackenzie*, Fisher's An. Digest for 1877, 400; *Baker v. Whiting*, 3 Sumner, 476; *Snyder v. Wolford*, 33 Minn. 175; S. C. 22 N. W. Rep. 254; *Peebles v. Reading*, 8 Serg. & R. 484; *Burrell v. Bull*, 3 Sandf. Ch. 15; and other cases heretofore cited.)

The defendant also urges, in connection with the statute of frauds and the fact that the plaintiff did not advance the purchase-money, the further facts that the plaintiff has never had the possession of the property in controversy and has never made any improvements thereon. We do not think that these further facts can make any difference. The plaintiff could not have taken the possession of the property until after he had purchased Mrs. Dihle's title thereto, and he employed the defendant for no other purpose than to assist him in purchasing such title; and it was solely the defendant's fault that he never obtained the possession of the property. We think that the other facts upon which the resulting trust is claimed are, aside from possession and improvements, amply sufficient. Even the defendant himself and his authorities would not consider possession and improvements as of any importance if the plaintiff had advanced the purchase-money. The facts that the defendant was the agent of the plaintiff for the purpose of negotiating for the purchase of the property; that in violation of his agency he purchased the property for himself and took the title thereto in his own name; and the further facts that the plaintiff has elected to treat the defendant as a trustee holding the property for the plaintiff, and has tendered to the defendant the full amount which the defendant paid for the property, and an additional amount sufficient to compensate the defendant for all his services as agent, are, we think, sufficient to entitle the plaintiff to recover. But besides these facts, the plaintiff, as before stated, also had an

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interest in the property, or in at least one-half thereof, at the time when the defendant purchased the same. And we might further state that the plaintiff had previously employed the defendant to act as agent for him in the purchase of other real estate, and had paid him for his services, which fact, together with the present employment, indicates that more intimate and confidential relations existed between the parties than a single transaction or a single employment would.

Under the facts of this case, as heretofore stated, we think the plaintiff holds the paramount equitable title to the property in controversy, and that the defendant merely holds the naked legal title, and that he holds the same in trust for the plaintiff. Therefore we think the plaintiff is entitled to recover in this action. This renders it unnecessary to consider any of the other questions supposed to be involved in this case. We might, however, say that from a hasty examination of the plaintiff's tax title, we are inclined to think that it is also good, and with reference to lot 100 is a better title than that procured from Mrs. Dihle.

The judgment of the court below will be affirmed.

All the Justices concurring.

35	130
48	573
85	130
49	355
50	60
35	120
52	482
52	711

JOHN F. BECKMAN, *et al.*, v. W. H. SIKES.

GROWING CROP—*Lien of Mortgage.* After the foreclosure of a mortgage upon a tract of real estate, the mortgagor planted a crop of corn thereon, which was immature and growing when the land was sold pursuant to the decree of foreclosure. One day before the sale of the land, the mortgagor sold the corn to another, who claimed the same as against the purchaser of the land. *Held*, That the lien of the mortgage and decree of foreclosure attached to the growing crop as well as to the land, and that the purchaser of the land under the decree will be entitled to the growing and unsevered crop in preference to the vendee of the mortgagor, unless there was a reservation of the crop, or unless the purchaser had waived his right to claim the same.

Error from Riley District Court.

ACTION by *Sikes* against *Beckman* and another, to recover the value of a certain crop of corn and oats. Judgment for plaintiff for \$292 and costs, at the December Term, 1884. The defendants bring the case here. The opinion states the facts.

Green & Hessin, for plaintiffs in error.

Charles N. Russell, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by W. H. Sikes, to recover the value of a crop of corn and oats alleged to have been converted by the plaintiffs in error, John F. and C. H. Beckman, who were defendants below. It appeared upon the trial that one C. M. Baker was the owner of the land upon which the crop was grown. He had mortgaged the land, and the conditions of the mortgage having been broken, it was foreclosed on December 15, 1883. There being a stipulation in the mortgage for a waiver of appraisement, it was decreed that the land should be sold without appraisement at the expiration of six months from the date of the decree. On June 19, 1884, an order of sale was issued under the decree, and after due notice a sale of the premises was made on August 1, 1884, to one H. C. Crump. The sale was subsequently confirmed, and on September 5, 1884, a deed was made by the sheriff to the purchaser. After the decree of foreclosure, but before the sale was made, Baker planted and cultivated a crop of oats and corn upon the premises decreed to be sold. On July 31, 1884, just one day prior to the sale of the premises by the sheriff, Baker sold, or attempted to sell, the crop to Sikes; and it was under this purchase that he claimed the oats and corn, the value of which he seeks to recover in this action. The Beckmans claimed under Crump, from whom they purchased the land on which the crops were grown. At the trial the plaintiffs in error contended that crops grown upon the

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land at the time it was sold and conveyed, passed with the land to H. C. Crump, the purchaser at the sheriff's sale. This view was rejected by the trial judge; and instead, he directed the jury that the purchaser at the sheriff's sale was not entitled to the crop grown upon the land where such crop had been sold by the judgment debtor prior to the day of sale, and that if they believed from the evidence that Sikes purchased the oats and corn from C. M. Baker prior to August 1, 1884, their verdict should be for the plaintiff.

For this ruling the judgment obtained by the plaintiff below must be reversed. The oat crop had matured and was harvested prior to the sheriff's sale, but the corn crop was yet immature and unsevered. In *Smith v. Hague*, 25 Kas. 246, a case where a crop was planted upon the land after a judgment had been rendered decreeing a foreclosure of the vendor's lien against the land, and ordering that it be sold to satisfy such lien, and under such order of sale the land was sold before the crop was ripe or harvested, it was ruled that the crops which were then growing upon the land, and not reserved in the order of sale or at the sale, passed by the sale and deed of conveyance of the sheriff. The fact that the mortgagor or judgment debtor sold the growing crop prior to the sheriff's sale of the land, as it is claimed was done here, does not vary the case, because he could not pass a title greater than his own, and therefore Sikes obtained no better right to the growing crop than Baker had or could give. Of course the mortgage, as well as the judgment decreeing a foreclosure, was only a lien upon the land, and did not confer title. The title and right of possession remained in the mortgagor until the sale and conveyance of the land. Until that time he was entitled to the use of the land, and to all the crops grown thereon that had ripened and were severed. The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop knowing that it was subject to the mortgage and liable to be divested by the foreclosure and sale of the premises. Anyone who purchased such crops from him took

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them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crop ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation or waiver of the right to the crop at such sale, the title to the same would pass with the land. (*Smith v. Hague*, supra; *Chapman v. Veach*, 32 Kas. 167; *Garanflo v. Cooley*, 33 id. 137; Jones on Mortgages, §§ 676, 780, 1658; 1 Washburn on Real Property, 3d ed., 124; *Jones v. Thomas*, 8 Blackf. 428; *Downard v. Groff*, 40 Iowa, 597; *Shepard v. Philbrick*, 2 Denio, 174; *Lane v. King*, 8 Wend. 584; *Gillett v. Balcom*, 6 Barb. 370; *Soriven v. Moote*, 36 Mich. 64; *Howell v. Schenck*, 4 Zab. 89; *Pitts v. Hendrix*, 6 Ga. 452; *Rankin v. Kinsey*, 7 Bradw. 215; *Sherman v. Willett*, 42 N. Y. 146; 1 Schouler's Personal Property, 133.)

It follows that the instruction given was erroneous, and therefore the judgment will be reversed, and the cause remanded for another trial.

All the Justices concurring.

J. P. FENLON V. J. S. GOODWIN, *et al.*

ATTACHMENT—Waiver of Error in Discharging. Where a suitor brings to the supreme court for review an order of the district judge at chambers, discharging an attachment that had been obtained at his instance, and, after the petition in error is filed, voluntarily releases the attached property and causes it to be delivered to the adverse party, *held*, that he thereby acquiesces in and affirms the order complained of, and waives any error that may have been made in discharging the attachment.

35	123
35	410
35	123
56	271
35	123
57	701
35	123
76	922

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Error from Mitchell District Court.

THE plaintiff *Fenlon* brings here for review an order made by the judge of the district court at chambers, discharging an attachment. The opinion states the case.

Lucien Baker, and *William C. Hook*, for plaintiff in error.

Ellis & Ellis, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J. : On November 24, 1884, the plaintiff brought suit against the defendants upon a promissory note executed by them for \$1,050. At the same time, he filed an affidavit upon which an order of attachment was obtained, which was levied upon a valuable herd of cattle belonging to the defendants. On December 5, 1884, the defendants in an affidavit denied the grounds laid for attachment, and moved to discharge the same. A hearing was had before the judge of the district court at chambers, whereat both written and oral testimony was offered, which resulted in an order discharging the property. The plaintiff excepted, and brought this proceeding to review that order.

It has been made to appear here on a motion to dismiss this proceeding, that since the petition in error was filed in this court, the sheriff who had the custody of the attached property, at the instance of the plaintiff, proposed to John S. Goodwin to release the cattle from the attachment and deliver them to Goodwin, provided he would release a claim which he held for feed furnished for the cattle while they were in the possession of the sheriff. This proposition was accepted, and the sheriff states that on March 31, 1885, he released the cattle, and unconditionally delivered them to the defendant John S. Goodwin. Goodwin immediately took possession of the cattle, and has ever since managed and controlled the same as his own, and has advertised for sale and sold the greater number of them without objection from the sheriff or the plaintiff.

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The motion to dismiss the proceeding must be sustained. By voluntarily surrendering and delivering the property to the defendants, the plaintiff has acquiesced in the order of the district judge which was brought up for review. The only question presented to the district judge, and the only one pending here, was as to whether the property should be retained under the process of the court to await the final determination of the action between the parties, or whether it should be released from the attachment and delivered to the defendant. The plaintiff has elected to end the controversy, and by his voluntary act has yielded all that was sought in the application for a dissolution of the attachment. He has ratified and affirmed the order of the district judge. The thing commanded to be done in the order made

Attachment,
waiver of error
in discharging. by the judge has since been voluntarily done by the plaintiff, and thus he has confessed that the order was rightfully made, and has thereby waived any error that may have occurred. It has been stated by this court that "a party who complains of a judgment must be consistent in his conduct with reference to it. If he recognizes its validity he will not be heard to say that it is invalid." (*Babbitt v. Corby*, 13 Kas. 612.) The case cited applies here. There a party claimed title to a tract of land under two tax deeds. The court found against his title, but also found that he was entitled to the payment of the taxes paid upon the land, with interest. After commencing proceedings to reverse the decree of the court, he voluntarily accepted the money adjudged to be paid to him; and it was held, that by voluntarily accepting the proceeds of the judgment he waived any errors, if there were any. And here the release of the attached property not only operates as a waiver, but it disposes of the question pending between the parties, and leaves no actual controversy for our determination.

The motion to dismiss will therefore be allowed.

HORTON, C. J., concurring.

Barr v. Randall.

S. M. BARR V. WILLIAM RANDALL, *et al.*

TAX DEED, Not Absolutely Void; Statute of Limitations. Where a person owns a tax-sale certificate and is entitled to have a valid tax deed executed thereon, but such person is at the time the county clerk of the county in which the tax deed is to be executed, and such person as county clerk executes the tax deed to himself as an individual, and the tax deed is immediately recorded, *held*, that it is not absolutely void, and that after the statute of limitations relating to tax deeds has completely run in its favor, it will be valid and not even voidable.

Error from Marshall District Court.

EJECTMENT, brought by *Barr* against *Randall* and wife. Trial at the August Term, 1884, and judgment for defendants. The plaintiff brings the case here. The opinion states the facts.

E. W. Sargent, for plaintiff in error.

Doniphan & Reed, and *A. E. Park*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by S. M. Barr against William Randall and Elizabeth Randall his wife, to recover certain real estate situated in Marshall county. The action was tried before the court without a jury, and the court, after making certain findings of fact and conclusions of law, rendered judgment in favor of the defendants and against the plaintiff for costs. The plaintiff brings the case to this court for review.

It appears that one James C. Smith held the original patent title to the land in controversy, and that the plaintiff claims under a quitclaim deed from him. The defendants claim through intermediate conveyances under a tax deed executed by the county clerk of Marshall county to Russell S. Newell. It appears that on May 6, 1862, the taxes against the land in controversy for the year 1861 were still due and unpaid; that on that day the land was sold for such taxes to Marshall

35	126
45	490
35	126
68	393

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county, and on the same day the county treasurer assigned the tax-sale certificate to Russell S. Newell. Newell at the time was county clerk of Marshall county, but under the laws as they then existed the county clerk had nothing to do with the tax sale, or the tax-sale certificate, or the assignment of the tax-sale certificate. All these things were then embraced within the duties of the county treasurer. Newell afterward paid the taxes for the years 1862 and 1863, and on May 13, 1864, by the authority vested in him as the county clerk of Marshall county, and in pursuance of said tax sale and the assignment of the tax-sale certificate and the payment of the taxes for the years 1861, 1862 and 1863, executed to himself, as an individual, the tax deed in controversy. In other words, the grantor in the tax deed appears to be Russell S. Newell, the county clerk of Marshall county, and the grantee appears to be Russell S. Newell; and the parol evidence introduced on the trial shows that the two are one and the same person. On May 14, 1864, this tax deed was duly recorded in the office of the register of deeds of Marshall county. On July 17, 1875, Newell by a quitclaim deed conveyed the land in controversy to I. C. Legere; on June 5, 1876, Legere by a quitclaim deed conveyed the same to Mary A. Watkinson; on March 21, 1881, Mary A. Watkinson by a quitclaim deed conveyed the land to the defendant, William Randall, and Randall immediately took possession of the land, and has continued in the possession thereof ever since, and has made lasting and valuable improvements thereon; and he and his grantors have paid all the taxes assessed against the land from the year 1861 up to the present time. On January 25, 1884, the plaintiff Barr commenced this action to eject the defendant Randall and his wife from the premises.

The only question involved in the case is, whether the aforesaid tax deed is absolutely void, or not; and the principal objection urged against its validity is that it was executed by Russell S. Newell, as county clerk, to himself, as an individual. The sale seems to have been regular and valid in every particular. The purchase of the tax-sale certificate by Newell

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from the county treasurer seems also to have been regular and valid; but concerning this matter we shall have more to say hereafter. So also does the assignment of the tax-sale certificate seem to have been regular and valid; and at the time when all these proceedings were had, the county treasurer, under the statutes, had the right to sell and assign the tax-sale certificate to any person who desired to purchase, without any aid or assistance from the county clerk or consultation with him. Hence, at the time when the tax deed was executed, Russell S. Newell, as an individual, had an unquestionable right to the tax-sale certificate, and an unquestionable right to have a valid tax deed executed thereon to himself; and if he had resigned his office of county clerk and another person had been appointed to take his place, he could have compelled such other person by a writ of mandamus to execute to him a valid tax deed.

There is another supposed irregularity, as follows: It is probable that Newell paid the entire purchase-money for the tax-sale certificate in county scrip, and not in cash or in the various warrants on the treasuries of the state, cities, townships, school districts, etc., to which the various items of the consideration for the tax-sale certificate belonged. This may not be the case, however, for presumptively the officers did their duty. Presumptively also, from the *prima facie* character of the tax deed in whose favor the statute of limitations has long since completely run, everything except the fact that Newell appears to be both the grantor and grantee in the tax deed, was regular and valid. Also, upon the face of all the tax proceedings prior to the tax deed, everything seems to have been regular and valid. *But Newell, who was a witness on the trial for the plaintiff, testified in terms that he paid for the tax-sale certificate in question in county scrip.* Now it was unquestionably proper for him to pay a portion of the consideration for the tax-sale certificate in county scrip, and possibly all, under the statutes as they then existed. Indeed, it would be difficult to give a good reason why all might not have been thus paid under the statutes as they then existed; but supposing,

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for the purposes of this case, that such a payment was not proper, still such payment did no harm to the original owner of the land or to any grantee of his, or to any person claiming under him. Under the decisions of this court, made in an early day under the statutes as they then existed, the original owner or his grantee had the same right to redeem the land from the taxes and the right to use the same kind of funds in doing so, after the assignment of the tax-sale certificate as before. (*Judd v. Driver*, 1 Kas. 455, 464, 465; *Guittard Twp. v. Comm'rs of Marshall Co.*, 4 id. 388, 397. See also Comp. Laws of 1862, ch. 198, § 8, *proviso*.) And further, neither the original owner nor his grantee in the present case has ever attempted to redeem the land from the taxes, but totally abandoned the land from the year 1861 up to 1884, when this action was commenced, a period of nearly twenty-four years. Hence this irregularity of paying the entire consideration for the tax-sale certificate in county scrip, if it can be called an irregularity, is of such small dimensions, and of such inconsiderable consequence, that we shall hereafter entirely ignore it and exclude it from all further consideration.

The only irregularity, then, of any considerable consequence, is the one, that the person who executed the tax deed as an officer and as grantor was also the individual person to whom the tax deed was executed as grantee. We shall assume that the fact that the grantor and the grantee mentioned in the tax deed were one and the same person, acting and receiving merely in different capacities and in different relations, would render the tax deed voidable; and that any person having an interest in avoiding the tax deed might do so at any time before the statute of limitations had completely run in its favor. But the question then arises: Is the tax deed so absolutely void that no statute of limitations can make it good? The tax deed in the present case was on record nearly twenty years before this or any other action was commenced to defeat or avoid the same, and before this or any other action was commenced which could have the effect of defeating or avoiding the same. We hardly think that the tax deed in this case ever was more

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Tax deed not absolutely void; statute of limitations, a bar.

than voidable; and we are also inclined to think that the statute of limitations has so completely run in its favor that all action having for its object the defeat or avoidance of the tax deed is now completely barred. The tax sale was itself unquestionably valid; the transfer of the tax-sale certificate, notwithstanding the aforesaid slight irregularity, was also unquestionably valid, and Newell, as before stated, had an absolute right to a tax deed; and no one but himself as county clerk could execute the same; and there is no statute which in terms prohibits him from executing the same, or which prohibits any county clerk from executing a valid tax deed to himself. We shall assume, however, upon general principles, that such a tax deed would be voidable so long as no statute of limitations had completely run in its favor; but is such tax deed absolutely void? Possibly it would have been better for Newell to have resigned his office of county clerk and allowed his successor in office to execute the tax deed to him; or perhaps it would have been better still for him to have held his tax-sale certificate until his term of office had expired, and then to have allowed his successor to execute the tax deed. But he chose to execute the tax deed himself, and in doing so he did not act in his own individual capacity, but acted in the capacity of county clerk, in the capacity of agent for the county or for the public, and possibly, also, as agent for the original owner; and if his action is wrong or unjustifiable, it would seem that he could be called to an account only by his principal, and within reasonable time, and not by some other person or persons, and after he had been favored by the complete running of a statute of limitations. Generally, where an agent sells the property of his principal to himself, no one but his principal can complain; and his principal may ratify and confirm the sale, and make it absolutely good. (*Eastern Bank v. Taylor*, 41 Ala. 93; *Leach v. Fowler*, 22 Ark. 143; *Ellis v. Peck*, 45 Iowa, 112; *Wharton on Agency*, § 235.) Wherever an agent, in acting for his principal, also deals with himself, the principal may ratify and confirm such dealings and make them good; and in all cases

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such dealings will be held to be valid unless the principal chooses to hold them invalid. Such dealings are not void, but only voidable at the option of the principal. (See authorities above cited and hereafter cited.) If they were absolutely void, then any person under any circumstances and in any case could treat them as void, which we suppose would be carrying the doctrine of invalidity for irregularities further than any person would desire. Now the county clerk was the agent of the public, and executed the tax deed as the agent of the public, and under an express statutory authority, and whether he was also the agent of the original owner, or not, can make no difference. In either case the tax deed would not be absolutely void, but at most only voidable. If we should assume, however, that a county clerk, when executing a tax deed, is not only the agent for the public, but is also the agent for the original owner of the land, still we would think that the original owner in the present case would not have much to complain of. The original owner in the present case, including his grantee, had failed to pay his taxes and his land had been sold therefor, and a tax deed was due thereon, and Newell, as county clerk, was the only person who could execute it; and Newell, as an individual, was the only person who was entitled to receive it; and there is nothing in the statutes that would prevent Newell, as county clerk, from executing the tax deed to Newell, as an individual. And whether a valid tax deed were executed to Newell or to some one else, or by Newell or by some one else, could not make the slightest difference to the original owner, or to anyone holding under him. This objection to the tax deed is purely technical, and yet it is not founded upon any inflexible rule or mandate of written law, but only upon some supposed general principles of unwritten law.

Besides, the original owner, and his grantee, the present plaintiff, abandoned the land for about twenty-four years, and allowed the defendant, Randall, and his grantors, to pay all the taxes thereon, and to make lasting and valuable improvements thereon. No fraud is shown in the present case, nor the slightest unfairness. Everything seems to have been fairly

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done, and in good faith, and in accordance with the letter of the statute, except as we have heretofore stated, and the worst that can be urged against the tax deed is the peculiar mode in which it was executed. Hence, we would think that the tax deed ought to be held valid, after the statute of limitations has completely run in its favor. By abandoning the land for so great a time, and allowing the statute of limitations to run in favor of the tax deed, the plaintiff and his grantor have ratified, confirmed, and made good the irregular execution of the tax deed. (*Pierce v. Benjamin*, 31 Mass. 356; *Bassett v. Brown*, 105 id. 551; *Greenwood v. Spring*, 54 Barb. 375; *Marsh v. Whitmore*, 88 U. S. 178.) And, indeed, every other supposed irregularity or illegality has been cured by the running of the statute of limitations. In this state, the statute of limitations relating to tax deeds purports by its terms to apply to all tax deeds, whether good or bad, or void or voidable, "except in cases where the taxes have been paid or the land redeemed as provided by law." (Gen. Stat. 1868, ch. 107, § 116; Comp. Laws of 1879, ch. 107, § 141.) Now the plaintiff in this case does not claim that he or his grantor ever paid the taxes on the land, or ever offered to pay them, or ever redeemed the land from the taxes, or ever offered to redeem the same. He merely sets up supposed irregularities to defeat the tax deed.

We would also refer to the following cases, not as being entirely applicable to this case, but as furnishing some support to the views we have herein expressed: *Cuttle v. Brockway*, 24 Pa. St. 145; *Russell v. Reed*, 27 id. 166; *Cuttle v. Brockway*, 32 id. 45; *Chorpenning's Appeal*, 32 id. 315; *Ellis v. Peck*, 45 Iowa, 112; *Morton v. Waring*, 18 B. Mon. 72, 84, *et seq.*

There are some other objections urged against the tax deed, but we do not think that any of them are tenable. We might, however, in conclusion, say that even if it were true in the present case that the tax-sale certificate which was made by the county treasurer in 1862 was so made for an amount which did not include the county treasurer's own fees, but was sufficient in every other respect, the fact that the amount did not include the county treasurer's own fee would not render the

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tax deed, afterward issued thereon, void. (*Case v. Frazier*, 30 Kas. 343.)

The judgment of the court below will be affirmed.

JOHNSTON, J., concurring.

HORTON, C. J.: It appears from the evidence in this case that Russell S. Newell was the clerk of Marshall county from 1862 to 1864; that he had to take his pay for his services in scrip worth from twenty-five to thirty-five cents on the dollar; and that while acting as county clerk he procured assignments of tax-sale certificates to himself under an arrangement with the county treasurer, but did not, as a general thing, pay for the certificates until redemptions were made. When he did pay, the county treasurer accepted county scrip in full payment. When he did not have enough of his own scrip to pay for these assignments, he obtained scrip from the county treasurer so to do. In this way, both the county clerk and the treasurer realized dollar for dollar from their scrip. The county treasurer was a merchant, and in addition to receiving county scrip for his services, also received it at a depreciated price in payment of his goods. This collusive arrangement between these officers of course cannot be sustained, and I am very clearly of the opinion, that any person having an interest therein could have set aside the alleged assignments of the tax-sale certificates made in pursuance of the foregoing arrangements; and I am further of the opinion, that, in this case, any person having an interest in avoiding the tax deed in controversy might have done so, at any time before the statute of limitations had fully run in its favor; but it does not appear that James C. Smith, the patentee of the land in controversy, or anyone for him or holding under him, ever offered to redeem the land from the sale of taxes before the issuance of the tax deed, or before the statute of limitations had completely run in its favor. Indeed, it appears from the facts that the original owner abandoned the land for a very great length of time, and the holder of the tax deed and his grantees have paid all the taxes from 1861 to the present time, and have

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also made lasting and valuable improvements thereon. This action was not commenced until January 25, 1884, nearly twenty years after the tax deed was recorded; therefore, I think that after the statute of limitations has fully run, considering all of the circumstances of this case, it is too late now to say the tax sale is absolutely void upon its face.

In the case of *Cole v. Moore*, 34 Ark. 382, to which we are referred by counsel for plaintiff in error, where the purchase at a tax sale by a county clerk was held illegal, the tax sale was made on August 2, 1869; the action to set aside the certificate of purchase was brought April 19, 1870, less than one year. No question of the statute of limitations running in favor of any deed or tax certificate was in issue, argued, or discussed.

WILLIAM MACK V. JOHN M. PRICE.

1. **EJECTMENT; Occupying-Claimant Law; Proceeding in Error; No Estoppel.** Where a defendant who is defeated in an action in the nature of ejectment, after the verdict is rendered, files in the office of the clerk of the district court a written request for the benefit of the occupying-claimant law, and the judgment recites that the defendant has made claim for improvements as an occupying claimant, but such defendant stops with said request, and does not demand a jury for the assessment of his improvements, and excepts to the findings of fact and conclusions of law, and to the judgment rendered, and also obtains time in which to make and serve a case to review the rulings of the trial court, *held*, such defendant is not estopped by the steps so taken by him from instituting and maintaining proceedings in error to reverse the judgment rendered in the action against him.
2. **CASE, Distinguished.** The case of *Bradley v. Rogers*, 33 Kas. 120, distinguished.
3. **TAX DEED, Valid on Face.** A tax deed that is substantially in the form prescribed by the statute is valid on its face, although immaterial words of the statutory form are omitted, if everything of substance required by the statute as to form is found in the deed, when all of the recitations of the deed are taken together and so considered.

35	134
45	209
45	490

35	134
72	430
72	431
74	555

35	134
76	773
76	778
76	923

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4. **TAX DEED—Words Properly Omitted.** Where a tax deed recites that no person offered to pay the taxes, interest and costs (naming the amount) then due and remaining unpaid on certain lots, (describing the same,) nor any part or parcel thereof, and that the whole of said real estate was bid off by the county treasurer for the county for the amount of taxes, penalty and charges, and that subsequently, upon a date named, the county clerk of the county duly assigned the certificate of sale of said real estate, and all the right, title and interest of the county therein and to said property, to one M., *held*, that the words "was the least quantity bid for" were properly omitted from the tax deed, as the county is not a voluntary or a competitive bidder. (*Larkin v. Wilson*, 28 Kas. 518; *Magill v. Martin*, 14 id. 67.)
5. **CASE, Distinguished.** The case of *Noble v. Cain*, 22 Kas. 498, distinguished.

Error from Atchison District Court.

ACTION brought July 28, 1883, by *John M. Price* against *William Mack*, for the recovery of the immediate possession of lots 12 and 13, in block 27, North Atchison, Atchison city. The defendant answered, admitting possession and claiming title in himself under a tax deed of December 7, 1869. Trial had at the November Term, 1884, by the court. The court made the following findings of fact:

"1. At the commencement of this action, the plaintiff was the owner in fee simple of the real property in controversy, to wit, lots 12 and 13, block 27, North Atchison, an addition to the city of Atchison, in Atchison county, Kansas, by a chain of conveyances from the government of the United States, the original owner, except as the same may be affected by the tax proceedings and tax deed hereinafter mentioned. Said lots were vacant, unimproved and unoccupied until the defendant took possession of the same as hereinafter stated, and no improvements have ever been made thereon except by the defendant.

"2. At the commencement of this action, the defendant was in the actual and visible possession and occupation of said real property, and he had been in such possession and occupation thereof ever since the year 1870, during which year he built a house thereon, into which he moved with his family. Ever since May 27, 1871, his possession thereof was under a claim of right by virtue of a tax deed executed by Chas. W. Rust, county clerk of said county of Atchison, of date December 7, 1869, acknowledged May 27, 1871, and recorded on the same

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day in book 'W,' at page 469, in the office of register of deeds of said county, with the following exception. Exhibit 'A,' attached to the defendant's amended answer, is a substantial copy of said tax deed and the acknowledgment thereof, namely: the concluding part of the body of said original deed is as follows, namely:

"In witness whereof, I, Chas. W. Rust, county clerk as aforesaid, have hereunto subscribed my name and affixed my official seal, on this 7th day of December, 1869.

[Signed] CHAS. W. RUST, *County Clerk.*

Whereas in said exhibit 'A' the concluding part of the body of the said deed as therein copied is as follows, namely:

"In witness whereof, I, Chas. W. Rust, county clerk as aforesaid, by virtue of authority aforesaid, have hereunto subscribed my name and affixed the official seal of said county, on this 7th day of December, 1869.

[Signed] CHAS. W. RUST, *County Clerk of Atchison Co., Kas.*

"The defendant paid \$1.50 as fee for recording said deed. The seal actually used by the county as established by the board of county commissioners and kept in the office of the county clerk, was the one used and affixed to the original deed herein.

"3. From evidence outside of said deed it appears that said real property was liable to taxation for the year 1862, and ever since, and that the same was assessed upon the assessment roll of said year as follows: Lot 12, block 27, North Atchison, to F. G. Adams, valuation \$20; lot 13, block No. 27, North Atchison, to F. G. Adams, valuation \$20; and said lots were placed on the tax-rolls of said year in accordance with said assessment roll, each lot being valued at \$20, and the total tax on each lot being 46 cents, and F. G. Adams being named as owner.

"From the record of tax sales, it appears that said lot 12, assessed to F. G. Adams, was sold to the county May 15, 1863, for 80 cents; certificate No. 2317; tax of 1863, \$1.51; tax of 1864, .74; tax of 1865, \$2.04; tax of 1866, .99; tax of 1867, 1.29; tax of 1868, \$1.22; assigned to William Mack, June 3, 1869.

"Lot 13, the same in all respects as lot 12, except that the certificate number is 2318; the duplicate book of tax sales in the county clerk's office shows all of the facts stated in the original book of tax sales, and also the further fact that each of said lots was deeded to William Mack, December 7, 1869.

"4. The tax-sale notice under which said lots were sold reads as follows:

"*Delinquent Tax List of Atchison County, for State, County, School and Township Tax for the year 1862.—I will offer for sale on the first*

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Tuesday of May next so much of each parcel of the following-described lands or lots as may be necessary to pay the taxes thereon, in front of the county treasurer's office in the city of Atchison, state of Kansas, commencing at 10 o'clock A. M. of said day, and continuing from day to day until disposed of.

(Signed)

FRANK BIER, *County Treasurer.*

Atchison, April 4, 1863.'

The accompanying list described said two lots:

"5. The notice of expiration of time for redemption from said sales is as follows:

"Tax Notice of the Expiration of the Time Limited for Redemption of Lots and Lands sold at the Tax Sales made in May, 1863, for Delinquent Taxes of the year 1862.—Notice is hereby given that all lands and lots sold on May the 5th, and subsequent days, remaining unredeemed, will be conveyed to the respective purchasers thereof unless redeemed on or before the day limited and hereinafter mentioned. The day of expiration, the amount of tax, including interest, to the last day of redemption, and the tax of 1864, also included, is as follows:

(Signed)

SAMUEL C. KING, *County Treasurer.'*

"In the list on file in the county clerk's office said lots 12 and 13 are under date of May 15, 1865. There is no name opposite the lots, nor upon the list, to indicate the ownership, nor to whom assigned. The amount carried out opposite lot 12 is \$4.45, and the amount carried out opposite lot 13 is \$5.45; said notice was published in the *Atchison Champion*, a weekly newspaper published in said Atchison county, and of general circulation therein, on December 8, 1864, December 15, 1864, December 22, 1864, and December 29, 1864, and in no other manner and at no other dates.

"6. Said lots were sold for the taxes of 1869, and the taxes of 1870 were charged upon the sale, the aggregate taxes for the two years being as follows: On lot 12, \$3.44; on lot 13, \$9.13; total, \$12.57. On May 6, 1871, the defendant redeemed the same from said sale and for said taxes of 1869, 1870, paying for such redemption as follows: For lot 12, \$5.16; and for lot 13, \$12.27; total, \$17.43, including certificate of redemption.

"7. The defendant paid the subsequent taxes on said lots as follows: Taxes of 1871, paid January 1, 1872, on lot 12, \$1.53, on lot 13, \$7.64; taxes of 1872, paid May 5, 1873, on lot 12, \$1.66, on lot 13, \$8.32; taxes of 1873, paid May 11, 1874, on lot 12, \$1.85, on lot 13, \$7.71; taxes of 1874, paid June 18, 1875, on lot 12, \$1.64, on lot 13, \$4.62; taxes of 1875, paid June 20, 1876, on lot 12, \$2.26, on lot 13, \$5.81; taxes of 1876, paid June 20, 1877, on lots 12 and 13, \$4.55; taxes of 1877, paid June 20, 1878, on lots 12 and 13,

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\$4.86; taxes of 1878, paid June 20, 1879, on lots 12 and 13, \$4.80; taxes of 1879, paid June 20, 1880, on lots 12 and 13, \$4.97; taxes of 1880, paid June 20, 1881, on lots 12 and 13, \$6.07; taxes of 1881, paid June 20, 1882, on lots 12 and 13, \$5.66; taxes of 1882, paid June 20, 1883, on lots 12 and 13, \$5.23; taxes of 1883, paid June —, 1884, on lots 12 and 13, \$5.57."

Thereon the court made the following conclusions of law:

"1. Said tax deed is not regular on its face, and is not in substantial compliance in form with the provisions of law, and it bears evidence upon its face that the provisions of the law were not complied with, and in the two proceedings prior to the execution of said tax deed the law was not complied with.

"2. The plaintiff is the owner of the real estate in controversy, and his cause of action is not barred by the statute of limitation.

"3. Before the plaintiff is let into possession of said real property, he should be required to pay to the defendant the full amount of all taxes paid by the defendant upon said real property, with interest thereon at the rate of fifty per cent. per annum and costs up to the date of said tax deed December 7, 1869, including the cost of said tax deed and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum, and the further amount of taxes paid by the defendant after the date of said tax deed, with interest thereon at the rate of twenty-five per cent. per annum.

"4. Subject to said charge for taxes and to the defendant's rights, if any, as an occupying claimant, the plaintiff is entitled to recover said real property, with costs of suit."

A copy of the tax deed attached to the answer, and marked "Exhibit A," is hereinafter set forth in full. The words therein inserted in italics are found in the statutory form, but not in the deed. The words in parenthesis are found in the deed, but not in the statutory form.

"*Know all men by these presents*, That whereas, the following described real property, viz., lots twelve and thirteen, block No. 27, North Atchison, Atchison city, situated in the county of Atchison and state of Kansas, was subject to taxation for the year 1862; and whereas, the taxes assessed upon said real property for the year aforesaid remained due and

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unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did, on the 15th day of May, 1863, by virtue of the authority in him vested by law, at an adjourned sale, *of the sale* begun and publicly held on the first Tuesday of May, 1863, expose to public sale at the county seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of (the) taxes, interest and costs, then due and unpaid *upon* said property; and whereas, at the place aforesaid, no person offering to pay the sum of one dollar and sixty cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property for lots twelve and thirteen, block No. twenty-seven, North Atchison, (nor any part or parcel thereof,) *which was the least quantity bid for*, the whole of said real property was bid off by the said county treasurer for said county of Atchison, for the amount of taxes, penalty and charges thereon as aforesaid; and whereas, the county clerk of said Atchison county did, on the 10th day of August, 1869, duly assign the certificate of the sale of the property as aforesaid, and all the right, title and interest of (said) Atchison county in and to said property to William Mack, of the county of Atchison and state of Kansas; and whereas, the subsequent taxes of the years 1864, 1865, 1866, 1867, 1868, amounting to the sum of twenty and $\frac{70}{100}$ dollars (and seventy cents) have been paid by the purchaser (and assignee of said certificate) as provided by law; and whereas, five years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law:

"Now, therefore, I, Chas. W. Rust, county clerk of the county aforesaid, for and in consideration of the sum of twenty-two dollars and thirty cents, taxes, cost and interest due on said land for the years 1863, 1864, 1865, 1866, 1867, and 1868, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said William Mack, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said William Mack, his heirs and assigns forever, subject, however, to all rights of redemption provided by law.

"In witness whereof, I, Charles W. Rust, county clerk as aforesaid, *by virtue of authority aforesaid*, have hereunto sub-

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scribed my name, and affixed [my] *the official seal of said county*, on this 7th day of December, 1869.

[Seal.]

CHAS. W. RUST, *County Clerk*.

Witnesses: WM. H. WILLIAMS,
D. E. MERWIN.

"[THE] STATE OF KANSAS, ATCHISON COUNTY, ss.—I hereby certify, that before me, J. J. Locker, a register of deeds in and for said county, personally appeared the above-named Charles W. Rust, clerk of said county, personally known to me to be the clerk of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as clerk of said county, and *who* acknowledged the execution of the same to be his voluntary act and deed as clerk of said county, for the purpose therein expressed.

"Witness my hand and official seal, this 27th day of May, 1871.

[Seal.]

J. J. LOCKER,

Register of Deeds."

The defendant excepted to conclusions of fact 3, 4 and 5, and to conclusions of law 1, 2, 3 and 4. Judgment having been entered accordingly, the defendant further excepted, and brings the case here.

Martin & Orr, for plaintiff in error.

L. F. Bird, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: John M. Price is the owner of the patent title to the lots in controversy. These lots were subject to taxation for the year of 1862, and were sold for delinquent taxes, May 15, 1863, and bid in by the treasurer of Atchison county; the certificate of sale was assigned by the county clerk of said county, August 10, 1869, to William Mack, and a deed issued to him for the lots on December 7, 1869, which was recorded May 25, 1871. In 1870, Mack took actual possession of the lots, and has ever since occupied them as a homestead for himself and family. The trial court determined that the tax deed under which Mack claims is not in substantial compliance with the provisions of law.

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Two questions are presented by the record: *First*, Is Mack estopped by the steps he has taken in order to avail himself of his rights as an occupying claimant from instituting proceedings in error to reverse the judgment? *Second*, Is the tax deed sufficiently regular on its face to set the statute of limitations in operation? The trial court filed its findings of fact and conclusions of law on December 2, 1884, and rendered judgment upon that day. The part of the judgment following the conclusions of fact and law was not actually entered upon the journal until December 6th. Price was adjudged the owner in fee simple of the lots in dispute, and entitled to the possession thereof, subject to all taxes, interest and costs allowed by law, and to the rights of Mack, if any, as an occupying claimant. On December 5, 1884, Mack filed in the office of the clerk of the district court his motion for the benefit of the occupying-claimant act, which motion was allowed, and when the judgment was entered, it recited that Mack had made claim for improvements as an occupying claimant. On January 16, 1885, Price filed in the office of the clerk of the district court his written demand for a jury to assess the value of the improvements. In *Bradley v. Rogers*, 33 Kas. 120, the defeated parties did not stop with merely requesting to be reimbursed for the taxes, interest and costs which they had paid upon the property in controversy, and for the benefit of the occupying-claimant law, but they went further, and demanded a jury for the assessment of their improvements, and such jury was awarded to them by the court. In this case, Mack made no demand for a jury, and the action of Price in making such demand cannot be considered to his injury, and therefore cannot be urged as an election by him to take the rights of a defeated party. We followed, in *Bradley v. Rogers*, a Nebraska case, but are unwilling to extend the law of election, concerning the institution of proceedings under the occupying-claimant law, any further than already announced. (*Buchanan v. Dorsey*, 11 Neb. 373.) Mack excepted to the findings of fact and conclusions of law of the trial court, and also to the judgment as rendered. He

² Case, distinguished.

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filed a motion for a new trial, and when that was overruled, he excepted, and obtained twenty days' time in which to make and serve a case-made to review the rulings of the trial court. Having made no demand for a jury for the assessment of his

improvements as an occupying claimant, and having made the exceptions he did, we do not think the steps taken by him after the rendition of the judgment debar him from instituting and maintaining these proceedings in error to reverse the judgment.

In support of the conclusion of the trial court that the tax deed is not in substantial compliance with the provisions of law, the following supposed irregularities are referred to:

First. It is said that "the tax deed recites that the sale was an adjourned sale begun and held on the first Tuesday of May, 1863;" but the recitation in fact is, "Whereas, the treasurer of said county did, on the 15th day of May, 1863, by virtue of authority in him vested by law, at an adjourned sale begun and publicly held on the first Tuesday of May, 1863," etc. The words "of the sale" in the statutory form are omitted from the deed. Section 36, ch. 197, Comp. Laws of 1862, in force at the date of the tax sale provides:

"The county treasurer shall, immediately after the day specified in the preceding section, make out a list of all the lands and town lots, describing such lands and town lots, as the same are described on the tax-roll, with an accompanying notice, stating that so much of each tract of land or town lot described in said list, as may be necessary for that purpose, will, on the first Tuesday of May next thereafter and the next succeeding days, be sold by him at public auction, at some public place, naming the same, at the seat of justice of the county, for the taxes, penalty and charges thereon."

And sec. 39 of said chapter 197 reads:

"On the day designated in the notice of sale, the county treasurer shall commence the sale of those lands and town lots on which the taxes, penalty and charges have not been paid, and shall continue the same from day to day (Sundays excepted,) until so much of each parcel thereof shall be sold as shall be sufficient to pay the taxes, penalty and charges

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thereon, including the cost of advertising and the fees for selling."

As a tax deed need not be in the exact form prescribed by the statute, but is good if it is substantially in the form prescribed, we do not think the omission of the words "of the sale" fatal. The recitation in the deed clearly shows that the treasurer sold the lots on the 15th of May, 1863, and that such sale was an adjourned sale succeeding the first Tuesday of May, 1863. The tax sale must of necessity have been an adjourned sale of the sale begun on the first Tuesday of May, 1863.

Second. The following words in the statutory form, "which was the least quantity bid for," are also omitted in the deed, but this omission is proper in every respect. The statute in 1863 required, as now, that if any land could not be sold for the amount of taxes and charges thereon, it should be bid off by the county treasurer for the county for such amount. The county is not a voluntary or a competitive bidder, and therefore, where a deed recites that no person offered to pay the taxes and charges and the county treasurer bid the same off for the county for the amount thereof, it would be improper to recite in a tax deed based upon such a sale, that the land bid off for the county "was the least quantity bid for." When the treasurer bids off property for the county, the county takes the whole property. (*Larkin v. Wilson*, 28 Kas. 513; *Magill v. Martin*, 14 id. 67.)

Third. Another objection to the deed is, that it shows on its face that it was executed for a less consideration than the amount due. If this be true, the objection is without force, as it was disposed of in the case of *Bowman v. Cockrill*, 6 Kas. 311. We quote from that decision as follows:

"As to the second supposed irregularity in the tax deed, this court is of the opinion that the blank was not filled up with the proper amount, but that it should have been filled up with a much larger amount—an amount equal to and including all the taxes, costs and interest due on said lot at the time the deed was made and paid by the holder or holders of the

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tax-sale certificate upon which said tax deed was made; but still, we think it is immaterial whether that blank was filled with the right amount or with a less amount, as a less amount can do no one any possible injury, unless it is the grantee of the tax deed himself. It can certainly do no injury to the original owner of the lot."

In the case of *Noble v. Cain*, 22 Kas. 493, to which we are referred, the county commissioners, without any authority, made an order that Cain might purchase certain lots struck off to the county at a tax sale for want of bidders, for a sum of money less than the cost of redemption. We held that this order was void, and that the purchase by Cain thereunder was equally void. This and nothing more. We did not intend to overrule or modify *Bowman v. Cockrill*, supra. The tax deed, however, recites a sale to the county on May 15, 1863, and that the county clerk of Atchison county, on August 10, 1869, duly assigned the certificate of sale of these lots, and all the right, title and interest of said county in and to the lots, to Mack. Within the case of *McCauslin v. McGuire*, 14 Kas. 234, upon such a recitation it will be presumed that the certificate was duly assigned, and that the assignee paid the amount required by law at the time of the assignment.

Fourth. The tax deed is not void because it shows the two lots were assessed, sold and deeded as one tract of land. (*McQuesten v. Swope*, 12 Kas. 32; *Watkins v. Inge*, 24 id. 612; *Cartwright v. McFadden*, 24 id. 662.)

Fifth. From the attestation or conclusion of the deed, "by virtue of authority aforesaid," and "my official seal," are omitted. The attestation or conclusion is as follows:

"In witness whereof, I, Chas. W. Rust, county clerk as aforesaid, have hereunto subscribed my name and affixed my official seal, on this 7th day of December, 1869.

[Seal.]

CHAS. W. RUST, *County Clerk.*

Witnesses: WM. H. WILLIAMS,
D. E. MERWIN."

The statute provides that it shall be substantially in the form prescribed. The deed recites that the sale is made by

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Chas. W. Rust, county clerk of Atchison county, and is witnessed by Chas. W. Rust as county clerk. As Chas. W. Rust signs the deed as county clerk, "my official seal" evidently refers to his official seal as county clerk, and therefore "the official seal of said county." We do not think the omission of the words noted renders the deed void. (*Haynes v. Heller*, 12 Kas. 381; *Morrill v. Douglass*, 14 id. 294; *Bowman v. Cockrill*, supra; *Geekie v. Company*, 9 Reporter, 37; *Scheiber v. Kaehler*, 5 N. W. Rep. 817; *Barr v. Randall*, just decided.) The substance of the words "by virtue of authority aforesaid" is fully expressed in other recitations of the deed, when the whole deed is taken and considered together.

Several cases in Wisconsin and other states are referred to by counsel, showing omissions in tax deeds which constituted, in those cases, fatal defects. So far as any of these decisions are in conflict with the prior adjudications of this court, we are not inclined to follow them. There is no doubt that the form of a tax deed prescribed by the statute must be substantially pursued, or the deed will be invalid, but all the terms of the deed must be considered, and if everything substantially required by the statute as to form is found in the deed, the deed will be *prima facie* valid although some immaterial words are omitted therefrom. There are no equities in this case in favor of the original owner, and if the tax deed is valid on its face, the statute of limitations having completely run in its favor, the deed becomes conclusive evidence of the regularity of the tax proceedings, and vests in the grantee an absolute estate in fee simple of the lots therein described. The original owner seems to have abandoned these lots in 1862, and has never paid any taxes thereon since that time—over twenty years—and no legal steps were taken by such owner, or any person claiming under him, to regain possession of the lots, until July 28, 1883. No taxes having been paid upon the lots for 1862, they were bid off by the county on May 15, 1863. On August 10, 1869, the county clerk of Atchison county assigned the certificate of sale to Mack, and on December 7, 1869, the county clerk issued to him a tax

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deed. In 1862, the lots were assessed at \$20 each, and are now worth between \$600 and \$700 without any improvements on them. Mack took possession of the premises in the spring of 1870. During that year he built a house thereon, into which he moved with his family, and since that time has fenced the lots and planted a great many trees on them. He has continued in the actual and peaceable possession of the lots ever since 1870, and has paid all the taxes assessed against the lots since 1862.

Upon the findings of fact of the trial court, we are of the opinion its conclusions of law that the tax deed is not in substantial compliance with the provisions of the statute, and that the original owner of the real estate is not barred by the statute of limitations, are erroneous. Therefore, upon the findings of fact Mack is entitled to judgment.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

EDWARD F. MADDEN V. THE STATE OF KANSAS.

1. *ANSWER, Construed; Unnecessary Reply.* In an action upon a forfeited recognizance the defendant, by a verified answer, averred that he signed the instrument when it was yet incomplete and what is commonly known as a blank recognizance, the blank spaces left therein for the name of the county, the offense charged, the amount in which the prisoner was held, and the court before which he was required to appear, being left unfilled; and that he attached his name to it upon the condition that another person should join him in signing the recognizance, and when so signed, the blanks should be filled out by the co-surety and the instrument delivered; and that unless it was so executed he was not to become liable thereon. He also alleged that the recognizance was not signed or completed by the other party, and therefore that he was not liable thereon. *Held*, That this answer was in substance and effect a denial that the recognizance sued on

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had been executed by him, and a verified reply by the plaintiff denying the allegations of the answer was unnecessary.

2. *RECOGNIZANCE—Surety, Liable.* A surety is liable on a forfeited recognizance, although it was signed by him when it was incomplete, where the blanks are afterward filled up and the instrument completed and delivered in his presence and under his direction.
3. ——— *Competent Evidence.* Where a surety claims and testifies that he signed the recognizance only upon the condition that another should join him as co-surety, proof that he was led to sign it by other considerations, such as indemnity furnished or property turned over to him by the prisoner, is not incompetent.
4. ——— *Default of Principal; Inadmissible Evidence.* Proof cannot be offered by the surety that the default of the principal was excused unless the acts relied on to excuse the default, and which rendered the performance of the condition of the recognizance impossible, have been pleaded by such surety.

Error from Ellis District Court.

ACTION upon a forfeited recognizance. Judgment for *The State*, at the November Term, 1884. The defendant *Madden* brings the case here. The opinion states the facts.

David Rathbone, for plaintiff in error.

E. L. Rooks, county attorney, and *D. C. Nellis*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: An information charging Orson Buno with the offense of grand larceny was filed in the district court of Ellis county, and he was required to enter into a recognizance in the sum of \$1,000 for his appearance at the following term of that court. He executed a recognizance, with Edward F. Madden as surety, which was accepted, and he was released from custody. Failing to appear at the next term, the court adjudged the recognizance to be forfeited, and thereupon the county attorney brought this action against the surety, Edward F. Madden. The cause was tried with a jury, and verdict and judgment were given in favor of the state for the amount named in the recognizance.

Objections are made that the verdict and findings of the

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jury are not sustained by sufficient evidence, and also to the rulings of the court on the admission of testimony. It is first contended that certain allegations in Madden's answer should have been taken as admitted, because the reply of the state to such answer was not properly verified. The petition contained the requisite allegations for a recovery upon a forfeited recognizance. In his answer Madden admitted signing the recognizance, but alleged that it was then incomplete, and what is commonly known as a blank recognizance; that the blank spaces left therein for the name of the county, the offense charged, the amount in which he was held, and the court before which he was required to appear, were at that time unfilled; and that he signed it upon the condition that John Duncan or his wife should join him in the execution of the recognizance, and when so executed, that Duncan should fill up the blanks in the recognizance, and that he was not to become liable thereon unless it was so signed and executed. He alleges that the recognizance was not signed by Duncan or his wife, nor were the blanks filled up by Duncan, and therefore that he never executed or delivered the bond upon which he was sued. In reply, the county attorney filed a general denial signed by himself and verified by Charles Miller, who swears that he has read the reply, and that the allegations thereof are true. It is claimed that this is not in conformity with the requirement of the code, as it is not stated therein that the affiant Miller had knowledge of the facts sworn to by him, nor does it state that he is the agent or attorney of the plaintiff, nor any other fact conferring authority upon him to verify the reply. It is unnecessary to consider or determine whether the verification as made was sufficient, for the reason that a verified reply was wholly unnecessary. The new matter alleged in the defendant's answer did not fall within the provisions of § 108 of the code. It is in substance and effect a denial that the bond sued on had been executed by him, and the plaintiff was not seeking a recovery upon any other. The defendant did not ask for any affirmative relief upon the instrument which he claims

1. Answer, construed; unnecessary reply.

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to have signed, and his averments respecting it only put in issue the execution of the recognizance upon which the action was brought.

Upon the sufficiency of the testimony there can be little question. It is true that Madden testified that he was not to become liable on the recognizance unless the blanks therein were filled out by John Duncan, and the recognizance signed by either Duncan or his wife. But on the other side, there is the evidence given by the sheriff, strongly corroborated by the testimony of other witnesses, that no such conditions were imposed or mentioned. They state that the recognizance was signed but not completed at the court house in the presence of the sheriff and prisoner, from which place they soon afterward went to the store of a Mr. Gates, who transferred to Madden a considerable sum of money belonging to the prisoner, to indemnify him on the liability which he assumed in signing the recognizance, and that after he had been so indemnified he directed the sheriff to fill up the blanks and complete the execution of the recognizance. The justification was then written thereon and signed by Madden, and when the recognizance was thus completed, the sheriff accepted it and released the

2. Recognizance;
surety, liable.

prisoner. This testimony was sufficient to warrant the jury in finding that the recognizance was executed by the surety prior to its delivery to the sheriff and the release of the prisoner, and sufficient to authorize a recovery thereon.

Objection is next made to the testimony that indemnity was given by the prisoner to the defendant for becoming his surety. Ordinarily, testimony that indemnity was given to the surety is immaterial in an action against him upon a forfeited recognizance. In this case, however, it was not improper. In his testimony Madden stated that he signed the recognizance only upon the condition that Duncan or his wife should join him as a co-surety. The testimony objected to tended to contradict

3. Competent
evidence.

this statement, and to show that no such conditions were mentioned; but rather that the inducement which led to the signing of the recognizance was the

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transfer and delivery by the prisoner to him of forty-one head of cattle, county scrip to the value of \$175, and \$500 in cash. For this purpose we think the testimony was competent.

It is finally urged that the court erred in not allowing an answer to the following question: "Now what, if you know, kept Buno away from here?" It is said that the answer might have disclosed the fact that he had a sufficient legal excuse for his absence; but as the issues were made up, the testimony was not competent. If the performance of the condition of the recognizance was rendered impossible by the act of God, such as sickness or death, or by the act of the state, it

would have afforded a complete defense. Before this defense can be availed of, however, it must be pleaded. The answer alleged no such defense, nor was there any application to set it up by an amendment. In the absence of any allegation that would excuse the default, the evidence offered was not admissible.

We see no error in the record, and will therefore affirm the judgment.

All the Justices concurring.

THE STATE OF KANSAS, *ex rel.* S. B. Bradford, Attorney General, v. THE BOARD OF COMMISSIONERS OF RUSH COUNTY.

1. INJUNCTION; *Void Order*. Where an injunction is granted at the commencement of an action by a district judge, without notice or appearance by the defendants, and no undertaking is furnished by the plaintiff, and no summons is issued, but the district clerk issues an alleged order of injunction forbidding the defendants from doing certain acts not recited or referred to in the petition, *held*, such order has no operation, and is wholly void, and may be disregarded by anyone.
2. RAILROAD—*Petition to Vote Aid; Duty of County Board*. Where a petition is properly presented to the board of county commissioners of a county, under the provisions of chapter 107, Laws of 1876, and

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the amendments thereto, to submit to the qualified voters of a township a proposition to subscribe to the capital stock of a railroad company proposing to construct a railroad through or into the township, and upon being examined and canvassed by the county commissioners is found to contain the requisite number of legal petitioners, it is the duty of the commissioners to cause an election to be held, as prayed for, to determine whether such subscription shall be made.

3. ——— *Limitation of Amount.* Chapter 90, Laws of 1870, does not control or limit the amount of bonds to be voted for under elections granted in accordance with the provisions of chapter 107, Laws of 1876, and the amendments thereto.

Original Proceedings in Mandamus.

On January 2, 1886, *The State of Kansas*, on the relation of the Walnut Valley & Colorado Railroad Company, filed its petition in this court against *A. C. Lippert, J. R. Stock, and J. E. Ruhl*, as the board of county commissioners of Rush county, praying that a writ of mandamus be awarded against the defendants, as said board, to convene and proceed to call elections in the townships of Garfield, Banner, Center, Union, and Belle Prairie, Rush county, and to submit at said elections, propositions to subscribe to the capital stock of the Walnut Valley & Colorado Railroad Company, in accordance with the terms and provisions of the petitions presented to said board of county commissioners. With leave of the court, *The State of Kansas*, on the relation of *S. B. Bradford*, attorney general of the state of Kansas, was substituted as plaintiff for the Walnut Valley & Colorado Railroad Company.

The facts stated as constituting grounds for the writ are substantially as follows: That the Walnut Valley & Colorado Railroad Company is a corporation created and existing under the laws of the state, to construct, operate and maintain a line of railroad into and through the townships of Garfield, Banner, Center, Union, and Belle Prairie, in the county of Rush; that in order to enable the company to construct, equip and operate its line of road, it is desirous of procuring from said townships subscriptions to its capital stock, to be paid for by the issuance of the bonds of the townships; that on Decem-

ber 16, 1885, said railroad company presented to the board of county commissioners of Rush county, petitions praying that an election be called to submit to the qualified electors of each of said townships, propositions to subscribe to the capital stock of said railroad company, and issue the bonds of said townships in payment therefor, in the following amounts, to wit: In Garfield township, \$17,500; Banner township, \$17,500; Center township, \$18,500; Union township, \$17,000; and Belle Prairie township, \$16,500; that the assessed valuation of the property in each of said townships is sufficient to authorize each township to vote the amount of aid to the railroad company requested in each of the said several petitions; that the petitions so presented to the board of county commissioners of Rush county each contained the signatures of more than two-fifths of the resident tax-payers of said townships; that this fact was ascertained and decided by the board of county commissioners in its canvass of the petitions; that it was the duty of the board of county commissioners, upon the presentation of said petitions, to call the elections in each of said townships, as prayed for, and to direct the sheriff to make the necessary proclamations thereof, to the end that the propositions might be submitted to the legal voters of said townships; that the defendants, acting as such board of county commissioners, wholly disregarded their duty in the premises, and failed and refused to call said elections, or any of them, in any of said townships; that after the board of county commissioners refused to call said elections, for the purpose of procuring some excuse therefor, by collusion with one D. A. Stubbs, the defendants procured said Stubbs to file, in the district court of Rush county, a petition praying for an injunction to restrain them from calling the elections; that no legal order of injunction was ever issued in the case, yet the defendants pretended that they were prevented and prohibited from calling the elections, or any of them, by reason of said proceedings; that the several petitions to the board of county commissioners as aforesaid, were presented under the provisions of an act of the legislature of the state of Kansas, entitled "An act to en-

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able counties, townships and cities to aid in the construction of railroads, and to repeal section 8 of chapter 39 of the Laws of 1874," which took effect February 26, 1876, and the amendments thereto.

On January 2, 1886, an alternative writ of mandamus was allowed and issued upon the foregoing petition of plaintiff, and on February 24, 1886, the defendants filed their return and answer thereto. The following allegations, among others, are contained therein :

"That under the limitations provided in chapter 107, Laws of 1876, to wit, 'That no township shall be allowed to issue under the provisions of this act more than fifteen thousand dollars and five per cent. additional of the assessed value of the property of such township,' the said several townships would be authorized to issue bonds not exceeding the following amounts, to wit: Garfield township, seventeen thousand seven hundred and ninety-nine dollars; Banner township, seventeen thousand five hundred and eighty-six dollars; Center township, eighteen thousand nine hundred and three dollars; Union township, seventeen thousand four hundred and sixty-six dollars; Belle Prairie township, sixteen thousand nine hundred and thirty-five dollars; that under the limitations provided in chapter 90, Laws of 1870, to wit, 'That the amount of bonds voted by any township shall not be above such amount as will require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest on the amount of bonds issued,' the said several townships would be authorized to issue bonds bearing six per cent. interest annually (the interest stated and prescribed in the propositions and petitions presented to said board by said railroad company and the petitioners), not exceeding the following amounts, to wit: Garfield township, nine thousand one hundred and ninety-seven dollars; Banner township, eight thousand six hundred and twenty-one dollars; Center township, thirteen thousand and eleven dollars; Union township, eight thousand two hundred and twenty-two dollars; Belle Prairie township, six thousand four hundred and fifty-two dollars; that the defendants have only refused to call the elections upon the said several petitions because of their doubt as to their authority so to do; that on December 29, 1885, they and each of them were enjoined from calling any of said elections in an action then pending, wherein the state of Kan-

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sas, upon the relation of D. A. Stubbs, was plaintiff, and said board of county commissioners was defendant; that the injunction suit has never been discharged or dismissed, and that the said action still remains pending and undetermined in the district court of Rush county."

H. Fierce, and *S. J. Hale*, for relator.

Hargrave & McCormick, and *E. A. Austin*, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: This is an action brought in this court by the plaintiff against the defendants, to compel the defendants to call an election to vote on the question of subscribing stock and issuing bonds to aid the Walnut Valley & Colorado Railroad Company to construct a line of road in and through the following townships of Rush county: Garfield, Banner, Center, Union, and Belle Prairie. It is admitted that the petition was properly presented, duly canvassed, and found to contain the requisite number of legal petitioners. The defendants answer that they are willing to order the elections requested whenever they have the right to do so, but are prevented by an injunction issued out of the district court of Rush county on December 29, 1885, in an action therein pending between the state of Kansas, on the relation of D. A. Stubbs, against the board of county commissioners of Rush county, and the limitations embraced in chapter 90, Laws of 1870—being an act to enable municipal townships to subscribe for stock in any railroad. It was clearly apparent to us, upon the hearing of this case, that said action is a collusive one, and that the defendants could have had the injunction dissolved at any time upon making proper application therefor. The petition is very defective—perhaps fatally so. It does not allege when the election is to be held, in what portion of the county, or in what townships, nor does it name any railroad company to whom the subscription is to be made. It does not name in any way the townships referred to in the alternative writ, nor that there is more than one township; and its averment in that respect is, "An election is to be ordered in a portion of the county to vote

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bonds to a branch of the A. T. & S. F. R. R. Co." This petition was presented to the district judge of Rush county on December 28, 1885; and without notice to defendants or appearance by them, he indorsed on the petition, "Temporary injunction allowed, upon the execution of a bond to the defendants in the sum of one thousand dollars, to be approved by the clerk of the district court of Rush county, Kansas.—J. C. STRANG, *Judge*."

No summons was issued prior to the commencement of this proceeding. Instead of issuing a summons and having the district clerk indorse thereon "Injunction allowed," as required by the statute, the clerk issued the order of injunction. This order attempts to forbid the commissioners of Rush county from calling elections in said townships of Garfield, Banner, Center, Union, and Belle Prairie, but is wholly unauthorized and void, because it is not issued in conformity with the petition or the order of the district judge. It names townships and a railroad corporation not mentioned in the petition; and further, said order of injunction, even if properly issued, is no obstacle to the granting of the elections, because the statute provides that an injunction shall not operate until the party obtaining the same shall furnish an undertaking, executed by one or more sufficient sureties. No proper injunction undertaking was given prior to the commencement of this action. All proceedings had in the case pending in the district court of Rush county subsequent to January 6, 1886, the date of the service of the alternative writ of mandamus, cannot prejudice the rights of plaintiff.

The other objection to ordering the elections in the several townships, is also without any force. The petition was presented under and in accordance with the provisions of an act of the legislature of the state of Kansas, of February 29, 1876, entitled "An act to enable counties, townships and cities to aid in the construction of railroads, and to repeal section 8 of chapter 39 of the Laws of 1874," and the amendments thereto. The law is the latest expression of the legislature, and

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the limitations in chapter 90, Laws of 1870, cannot apply or control the amount of bonds to be voted for under the elections prayed for.

It is not necessary to decide whether chapter 90, Laws of 1870, has any operation at this time, or whether it is wholly repealed. It is sufficient for this case to say that the petitions presented to the defendants comply, in all respects, with the provisions of chapter 107, Laws of 1876, and the amendments thereto, and that under the statute it is clearly the duty of the commissioners of Rush county to call the elections demanded.

Let a peremptory writ of mandamus issue against the defendants.

All the Justices concurring.

JOHN MORRIS V. ALICE N. COOPER, *et al.*

1. GUARDIAN'S BOND, *Construed*. From the language of the bond sued on in the present case and other facts, *held*, that the bond was given under § 7 of the act relating to guardians and wards, and not under § 15 of said act.
2. ——— *Purpose of Bond*. A guardian's bond executed under § 7 of the act relating to guardians and wards is intended as a security only for the proper use of the personal estate of the ward and the rents and profits of his real estate, and is not intended as a security for the proper use of the purchase-money received by the guardian on the sale of the real estate of the ward — another bond being required to be given for that purpose by § 15 of said act.

Error from Coffey District Court.

ACTION by Alice N. Cooper and another, against John Morris and two others, as sureties on a guardian's bond. July 30, 1884, judgment was rendered on the verdict for plaintiffs for \$361.64. To reverse this judgment, the defendant Morris

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brings the case to this court. The opinion contains a sufficient statement of the facts.

E. N. Connal, for plaintiff in error.

G. E. Manchester, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Alice N. Cooper and Caleb T. Noell, against Isabella Holland, Augustine Holland, and John Morris, on a guardian's bond. Judgment was rendered in favor of the plaintiffs and against the defendants, and the defendant John Morris brings the case to this court for review, making Alice N. Cooper and Caleb T. Noell the defendants in error.

It appears from the evidence in the case that sometime in November, 1861, Caleb T. Noell died, leaving a widow, Isabella Noell, now Isabella Holland, and a daughter, Alice N. Noell, now Alice N. Cooper; and soon afterward, to wit, on March 27, 1862, a son, Caleb T. Noell, was born. Caleb T. Noell, deceased, also left a small amount of real estate, but whether he left any personal property or not, is not shown. On May 13, 1870, Isabella Holland, as principal, and Augustine Holland, her husband, and John Morris, as sureties, executed the following bond, and Isabella Holland took and subscribed the following oath, to wit:

"GUARDIAN'S BOND.

"Know all Men by these Presents, That we, Isabella Holland, as principal, and ——— and Augustine Holland, as sureties, are held and firmly bound unto the state of Kansas in the sum of five hundred dollars, for the payment of which we bind ourselves, our heirs, executors and administrators by these presents, upon the condition that whereas, the said Isabella Holland has been appointed by the probate court of Coffey county, Kansas, guardian of the persons and estate of Alice N. Noell and Caleb T. Noell, children and heirs of Caleb T. Noell, deceased, minors, of Coffey county, Kansas, under the age of eighteen years:

"Now if the said Isabella Holland shall faithfully discharge all of her duties as such guardian according to law, then the

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above bond to be void, otherwise to remain in full force in law.

"In witness whereof, we hereunto subscribe our names, this 13th day of May, 1870.

ISABELLA HOLLAND. (Seal.)

JOHN MORRIS. (Seal.)

AUGUSTINE HOLLAND. (Seal.)

"STATE OF KANSAS, COFFEY COUNTY, ss.—I, Isabella Holland, do solemnly swear that I will faithfully and impartially and to the best of my ability, discharge all the duties that shall devolve upon me as guardian of the persons and estate of Alice N. Noell and Caleb T. Noell, children and heirs of Caleb T. Noell, deceased, minor heirs of Caleb T. Noell, deceased.

ISABELLA HOLLAND.

"Sworn to and subscribed before me, this 13th day of May, 1870.

JOHN M. RANKIN, *Judge.*"

This bond and oath were filed in the office of the probate judge on May 18, 1870, and on the same day Mrs. Holland was by the probate judge appointed guardian for the property of the minor heirs of Caleb T. Noell, deceased, by the following order, to wit:

"IN VACATION, May 18, 1870.—And now comes Isabella Holland, and represents that she is the mother of Alice N. Noell and Caleb T. Noell, minors under the age of fourteen years, and that the said heirs have property which may depreciate in value or remain unproductive if a guardian be not appointed; and the court being satisfied of the fitness of said Isabella Holland to act as guardian of the said wards, it is ordered that letters of guardianship issue accordingly to the said Isabella Holland, she having filed a sufficient bond as such guardian.

JOHN M. RANKIN, *Probate Judge.*"

On the next day, to wit, May 19, 1870, Mrs. Holland filed an application in the office of the probate court, asking permission to sell the aforesaid real estate which had descended to the said minor children, as the heirs of Caleb T. Noell, deceased, which application was granted by the probate court. No other or additional bond was ever given by Mrs. Holland; but, nevertheless, on June 6, 1870, as guardian, she sold said real estate to Joseph Newlan for the sum of \$250, which sale was approved by the probate court; and on the same day Mrs. Holland executed to Newlan a guardian's deed for the

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land. On June 8, 1876, Mrs. Holland reported that she had in her hands, belonging to her wards, \$258, principal and interest, all being the proceeds of said sale of real estate. On May 21, 1883, she further reported to the probate court that she had in her hands, belonging to her wards, \$361.64; this sum being the said \$258 and interest. This was her last report to the probate court. These reports were approved by the probate court. It does not appear that Mrs. Holland ever received anything belonging to her wards except the proceeds of the sale of said real estate and interest thereon. Some time after the time when this last report was made, but just when is not shown, this action was commenced. It was tried on July 24, 1884, before the court and a jury, and the jury rendered a verdict in favor of the plaintiffs and against the defendants for \$361.64; and to reverse this judgment the defendant Morris now brings the case to this court.

This action was on the aforesaid bond, and the principal question involved in the case is, whether there was any such breach of the bond as would render the sureties liable thereon. The plaintiffs below, defendants in error, claim that there was, while the defendant Morris, plaintiff in error, claims that there was not. The statutes providing for the giving of guardian's bonds, §§ 7 and 15 of the act relating to guardians and wards, read as follows:

"SEC. 7. Guardians appointed to take charge of the property of the minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate, and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardian, according to law. They must also take an oath of the same tenor as the condition of the bond."

"SEC. 15. Before any such sale or mortgage [of real estate] can be made or executed, the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duties in that respect, and account for and apply all moneys received by him, under the direction of the court."

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The first question presented in this case is, whether the bond in controversy was executed under § 7 of the act relating to guardians and wards, or under § 15 of said act. We think it was executed under § 7. We would think so from the language of the bond itself. Also the oath required to be taken by § 7, by a newly-appointed guardian, is attached to the bond, which would not be the case if the bond were given under § 15, which does not require that any oath should be taken. It was executed before Mrs. Holland was appointed guardian, and not afterward. It was filed on the day on which she was appointed guardian, and the appointment seems to have been made in pursuance of the filing of such bond. And at the time when the bond was executed and filed, no application had been made for the sale of any of the real estate of the minor children; and the bond does not mention real estate; and whatever may have been the intention of Mrs. Holland, there is nothing tending to show that at that time any of the other parties or the probate court had in contemplation the sale of any of such real estate. There is certainly nothing that tends to show that Morris when he executed the bond had the slightest hint or intimation that any of the real estate was ever to be sold. We therefore think that the bond was given under § 7 of the act relating to guardians and wards, and not under § 15.

The question then arises: Was there any breach of such bond? This question we think must be answered in the negative. This identical question has been decided under a similar statute by the supreme court of Indiana. That court held that a bond given by a guardian on assuming the duties of his trust is designed only to secure the faithful appropriation and investment of the personal estate of the ward, including the rents of the real estate, and that the sureties on such bond are not responsible for the misapplication of money received on the sale of real estate; the statutes requiring that another bond should be given as a security for the proper use of the purchase-money received on the sale of real estate. (*Warwick v. The State*, 5 Ind. 350.)

1. Guardian's bond, construed.

2. Purpose of guardian's bond.

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Also, to the same effect, see *Williams v. Morton*, 38 Me. 47.) And in Wisconsin it is stated as a general rule "that where an officer is required to perform a duty which is special in its nature, and he is required to give a special bond for the faithful performance of such duty, in the absence of any declaration that the general bondsmen shall be liable, no such liability attaches." (*Milwaukee County v. Ehlers*, 45 Wis. 281, 293.) And the Wisconsin court cites a large number of authorities in support of the foregoing proposition. Under § 7 of the act relating to guardians and wards, the guardian has no right to sell real estate. He simply takes charge of the personal property and the rents and profits of the real estate; and this is all that the bond is intended to cover. If it should be desired that the guardian should sell any portion of the real estate for his ward, he must first procure a special order for that purpose; and he must then, before he sells any of the real estate, execute another bond to the satisfaction of the probate court in the penal sum of at least double the value of such real estate, and the sureties on the general bond given at the time of the appointment of the guardian will have a right to suppose that the guardian will never be permitted to sell any of the real estate before he executes and files the special bond required by § 15.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

Morgan v. Field.

P. J. MORGAN V. LYMAN FIELD.

1. **MORTGAGE; Foreclosure; Jury Trial.** A jury trial cannot be demanded as a matter of right in an action to recover upon a promissory note, and to foreclose a mortgage executed to secure the same, where the pleadings admit the right to recover the amount claimed to be due upon the note, and nothing is left in controversy but the right to foreclose the mortgage, and to subject the property mortgaged to the payment of the amount admitted to be due.
2. **EQUITABLE TITLE—Sale to Satisfy Mortgage.** Where the mere nominal and legal title to a tract of land is conveyed without consideration, and with the intention and understanding that the real title and interest thereto shall remain in the grantor, who, for a period of more than eight years thereafter, and until his death, continued in possession and cultivated and treated it as his own, paying the taxes, and making valuable and lasting improvements thereon; and the grantee, although living in the immediate vicinity, made no claim to the possession of the land, or to the rents and profits of the same, and did not pretend to own or to exercise any supervision or control over it until after the death of the grantor; *held*, that the full equitable title to the land was in the grantor at the time of his death, and that the same may be sold to satisfy a mortgage previously given thereon by such grantor.

Error from Saline District Court.

ACTION by *Lyman Field* against Thomas Riordan as administrator of the estate of Dennis Morgan, deceased, to recover upon a promissory note executed by Dennis Morgan in his lifetime, on September 10, 1879, and to foreclose a mortgage given at the same time by Morgan upon a certain eighty-acre tract of land to secure the payment of said note. *P. J. Morgan*, who, it was alleged, claimed some right or interest in the mortgaged premises, was made a defendant. The administrator made default, but *P. J. Morgan* answered for himself, alleging that he was the owner in fee simple of the mortgaged premises and seized of a good and indefeasible title to the same, derived through conveyances from Dennis Morgan to John G. Spivey on the 4th day of November, 1873, and by John G. Spivey and wife to himself on the 6th day of No-

Statement of the Case.

vember, 1873, which deeds were duly acknowledged by the respective parties, and immediately recorded. The plaintiff replied, admitting the execution of the deeds mentioned by the defendant, but averred that the same were executed without consideration; that it was never intended by and between Dennis Morgan and P. J. Morgan, or between J. G. Spivey and P. J. Morgan, that the ownership of the land should be changed from Dennis Morgan to P. J. Morgan, and that Dennis Morgan, ever after the execution of the deed and until his death, remained in the actual possession of the land, and continued to exercise acts of ownership over it, and to receive all the profits and benefits thereof, without let or hindrance from P. J. Morgan, who resided in the vicinity of said land and never made any claim thereto. The plaintiff further alleged that he took the mortgage from Dennis Morgan as security for a loan of money without any actual notice of the deed to P. J. Morgan, and believing that Dennis Morgan was the real and sole owner of the land. Trial at the November Term, 1883. P. J. Morgan demanded a jury, which was refused, and the cause submitted to the court, when the following findings of fact and conclusions of law were made:

"1. The note and mortgage set up in plaintiff's petition were of their date duly executed by the deceased Dennis Morgan, in his lifetime, and for a valuable consideration. There is now due on them to the plaintiff a balance of \$—— from the estate of said deceased.

"2. Said deceased was in the fall of 1873, in his lifetime, engaged in litigation, and to save his property from the result of the same, if it should go against him, and for no other consideration, unless it was an attorney's fee of \$25, gave to his then attorney in said litigation, J. G. Spivey, Esq., and against his wish, a warranty deed to the tract of land mentioned in the petition and mortgage set up therein.

"3. In a few days thereafter said attorney's fee of \$25 was paid, and by request of said deceased said Spivey and wife then conveyed, by warranty deed, said tract to the defendant herein, P. J. Morgan, the own brother of the deceased, which conveyance was without any consideration whatever, and only in pursuance of the aforesaid plan to cover up his property,

Morgan v. Field.

and to save it from being taken in the event of a judgment against him in said litigation. All the parties to said transfer intended the real title and interest in the said land should remain in the deceased, and the full equitable title did so remain.

"4. Said deeds were duly, in the month of their execution, filed for record and recorded in the register of deeds' office of Saline county, Kansas, but the plaintiff had no actual notice of this fact at the time of receiving this mortgage.

"5. Said Dennis Morgan remained in possession of said land, residing upon and cultivating and improving it up to the time of his death, and the defendant, P. J. Morgan, has had possession since his brother's death.

"6. The personal estate of said deceased is exhausted, and all debts paid, save this to this plaintiff. Said Morgan died June 9th, 1881."

CONCLUSIONS OF LAW.

"1. The deed to said land to defendant P. J. Morgan is void as to this plaintiff, and the mortgage of plaintiff a valid lien thereon.

"2. The plaintiff is entitled to have his mortgage foreclosed, and the land sold to satisfy his claim."

The district court gave judgment accordingly in favor of the plaintiff, decreeing a foreclosure and sale of the land. To reverse this judgment *P. J. Morgan* brings the case here.

John Foster, for plaintiff in error.

Garver & Bond, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: The ruling of the court refusing the demand for a jury trial made by P. J. Morgan is assigned for error. In his petition, Lyman Field set forth a promissory note and asked for a recovery of the amount due thereon, as well as the foreclosure of the mortgage executed to secure the same. If issue had been joined upon the demand for money, a jury trial should have been awarded, as was decided in *Clemenson v. Chandler*, 4 Kas. 558; but no issue of fact was joined upon that question. The administrator of the estate of Dennis Morgan, deceased, made default. And the plaintiff in error did not deny the execution of the promissory note, nor ques-

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tion the right of the defendant in error to recover the amount claimed by him. The pleadings, therefore, admitted the allegations respecting the promissory note, and the right of defendant in error to recover judgment for the amount claimed, and left nothing to be tried except his right to have the mortgage foreclosed, and the lands sold in satisfaction of his claim. The issues joined between the defendant in error and P. J. Morgan were therefore purely equitable in their character, upon which a jury trial cannot be demanded as a matter of right. (*McCardell v. McNay*, 17 Kas. 434; *Woodman v. Davis*, 32 id. 344.)

The action of the court holding that the mortgage executed by Dennis Morgan in his lifetime should be foreclosed and the land sold in satisfaction of the claim for which the mortgage was given as security, is complained of. About six years before the execution of the mortgage the same land was conveyed by Dennis Morgan to John G. Spivey, and by Spivey conveyed to P. J. Morgan. It is apparent, however, from the findings of the court, that the conveyance to Spivey was voluntary and against Spivey's wish, and that the deed from Spivey and wife to P. J. Morgan was without any consideration, and that all of the parties to the conveyances intended that the real title and interest in the land should remain in Dennis Morgan. There was no actual transfer of the land by Dennis Morgan, nor did he part with its possession and control. The understanding of the parties was that the transfer was entirely nominal, and that the equitable title should be reserved to Dennis Morgan. Only a bare legal title was conveyed to P. J. Morgan, by whom it was to be held in trust for Dennis. It is true there was no express trust, the conveyance being absolute in form, and that something more than a mere parol agreement was necessary to create the trust and to reserve to Dennis Morgan the equitable title. It appears that, connected with the parol agreement or understanding, there were other facts and circumstances which it seems to us fully establish the trust. As we have seen, there was no change

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of possession. Dennis Morgan continued to reside thereon, cultivate, and treat the land as his own from the time of the conveyance until his death, a period of more than eight years. During all this time the taxes thereon were paid by him, and he also plowed considerable of the land, planted and cultivated apple and peach trees thereon, and made other lasting and valuable improvements, treating it as his own in all respects, as he had done prior to the conveyance to his brother. Although P. J. Morgan resided in the immediate vicinity of the land, no claim was made by him to it; he never claimed rent nor offered to pay taxes, nor undertook to obtain possession; and the probate judge testifies that after the death of Dennis Morgan, when the plaintiff came to take out letters of administration upon the estate of his brother, he admitted that the land in controversy was the property of the estate. It seems that soon after the deed was made to P. J. Morgan he returned the instrument to his brother, and there is some ground for the claim of counsel for defendant in error that it was understood between the plaintiff in error and his brother that any claim which the former might have set up under his deed was extinguished by the return of the instrument. Under all the facts in the case, we cannot doubt that the full equitable title to the land was in Dennis Morgan when the mortgage was executed and at the time of his death, and that the same is subject to the payment of his debts.

2. Equitable title; sale to satisfy mortgage.

We cannot sustain the objection of the plaintiff in error that the findings are not justified, as a careful reading of the testimony satisfies us that it sufficiently supports the result reached by the court. Nor can we disturb the judgment on account of the refusal of the court to restrict the cross-examination of the plaintiff in error. It did take a wide range, but it must be remembered that it was an examination of a party to the action, and the other party to the transaction inquired about was dead. Possibly some of the questions asked were somewhat remote from the matters inquired about in the examination-in-chief, but they were mostly explanatory of the

testimony given upon the direct examination, and as the trial was before the court alone, we do not think the plaintiff was prejudiced by the extended inquiry.

The judgment and decree of the district court will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS, *ex rel.* A. W. Edgerly, *County Attorney*, v. C. O. BROWN, *as Probate Judge of Coffey County.*

PROBATE JUDGE—No Forfeiture of Office. The duties imposed upon a probate judge by the provisions of § 8, chapter 8, Special Session Laws of 1874, concerning the examination and counting of the funds in the hands of a county treasurer, are distinct from the duties pertaining to the judicial office, and are somewhat in the nature of a new office. Therefore the right of a probate judge to enjoy the powers and emoluments of his office as probate judge does not depend upon a faithful discharge of the duties so imposed by said statute; and if he fails or neglects to make the examination and count required by the statute, he does not thereby forfeit his office as probate judge.

Original Proceedings in Quo Warranto.

ON November 11, 1885, The State of Kansas, *ex rel.* A. W. Edgerly, county attorney of Coffey county, filed the following petition against C. O. Brown, probate judge of said county:

"The State of Kansas, on the relation of A. W. Edgerly, county attorney of Coffey county, Kansas, and by virtue of the authority vested in him by law, gives the court here to understand and be informed, that at the general election of the year 1884, and on the 4th day of November, 1884, said defendant, C. O. Brown, was duly elected to the office of probate judge of Coffey county, Kansas, for the term of two years, to commence on the second Monday of January, 1885; that subsequently the said defendant duly qualified for said office, and on the second Monday of January, 1885, duly entered upon the discharge of the duties of his said office of probate judge of

35	167
65	23
35	167
69	816
35	167
176	716

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said county, and that ever since said second Monday of January, 1885, said C. O. Brown has been acting as probate judge of said county; that on and prior to the 1st day of January, 1885, and continuously since the 1st day of January, 1885, till after the 25th day of July, 1885, one D. V. Mott was the duly elected, qualified, and acting county treasurer of Coffey county, Kansas; that the said C. O. Brown, as judge of the said probate court, has, during his said term of office, neglected and refused to perform certain acts hereinafter particularly set forth and stated, which it was his duty as judge of the said probate court to perform, which neglect and refusal to do said acts cause and work a forfeiture of his said office of probate judge of said Coffey county, Kansas.

"1. He, the said C. O. Brown, as judge of the said probate court, neglected and refused, during the first quarter of this, the year 1885, to examine and count the funds in the hands of said D. V. Mott, the county treasurer as aforesaid of said Coffey county.

"2. He, the said C. O. Brown, as judge of the said probate court, neglected and refused, during the second quarter of this, the year 1885, to examine and count the funds in the hands of the said D. V. Mott, the county treasurer as aforesaid of said Coffey county.

"3. He, the said C. O. Brown, as judge of the said probate court, has during all the months of January, February, March, April, May, June, and July, in this, the year 1885, neglected and refused, and he has not at any time in any of the said months made any attempt to examine and count the funds in the hands of the said D. V. Mott, the county treasurer as aforesaid of said Coffey county and by reason of his said failure as aforesaid to examine and count the funds in the hands of the county treasurer aforesaid, as is required by law, the said D. V. Mott, county treasurer of said Coffey county, made default in a large sum, to wit, in the sum of forty-five thousand dollars.

"Therefore said county attorney, on behalf of and in the name of the state of Kansas, prays judgment that the said C. O. Brown, by reason of his aforesaid acts, refusal to act, and misconduct, may be adjudged and declared to have forfeited his said office of probate judge of Coffey county, Kansas, and that he be ousted and removed therefrom."

The defendant filed the following demurrer, (omitting court and title:)

"Comes now said defendant, C. O. Brown, probate judge of

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Coffey county, Kansas, and demurs to the petition of the plaintiff filed herein, for the following reasons, to wit:

"1. This court has no jurisdiction of the subject of the action attempted to be stated in the said petition.

"2. Said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant."

The opinion herein was filed at the April, 1886, session of the court.

A. W. Edgerly, county attorney, for The State; *S. B. Bradford*, attorney general, and *E. A. Austin*, of counsel; *Hazen & Isenhardt*, special counsel.

G. E. Manchester, for defendant; *G. N. McConnell*, and *John M. Rankin*, of counsel.

The opinion of the court was delivered by

HORTON, C. J.: This is an action in the nature of *quo warranto*, brought by the plaintiff to remove the defendant from the office of probate judge of Coffey county, in this state, because of an alleged failure to perform the duties imposed by § 3, chapter 8, Special Session Laws of 1874. This section reads as follows:

"It shall be the duty of the probate judge in each county, once during each quarter of each year, without notice to said county treasurer, to examine and count the funds in the hands of the county treasurer; and the county commissioners of each county shall, prior to each examination, appoint two persons, citizens and tax-payers of the county, whose duty it shall be to assist the probate judge in making the examination aforesaid; but no person so appointed shall act as examiner more than once in the same year." (Comp. Laws of 1879, ch. 25, § 75c.)

It has already been decided that the legislature may confer new duties — judicial, *quasi* judicial, or ministerial — upon probate courts or probate judges in this state, aside from the ordinary powers authorized by the constitution. (*In re Johnson*, 12 Kas. 102; *Young v. Ledrick*, 14 id. 92; *The State, ex rel.*,

The State, *ex rel.*, v. Brown, *Probate Judge*.

v. Majors, 16 id. 440; *Intoxicating-Liquor Cases*, 25 id. 751.) Whether they could be compelled to perform the duties which the various acts of the legislature undertake to require of them, outside of the jurisdiction defined by the constitution, has never been settled by this court. The decisions recognizing the authority of the legislature to confer upon probate courts and probate judges additional powers or duties not defined by the constitution, seem to assume that the authority thus exercised constitutes powers and duties distinct from those of a probate court or probate judge. Thus, in granting injunctions for the district court, a probate judge acts in the capacity of a commissioner of that court; a probate judge in granting a druggists' permit, acts somewhat as a commissioner of licenses or permits. (*In re Johnson*, *supra*; *Intoxicating-Liquor Cases*, *supra*; *State v. Laughton*, [S. C. of Nev.] 8 Pac. Rep. 344. See also the decisions of Benson, J., and Spilman, J., upon the power to appoint a county auditor, 2 Kas. Law Jour. 39-57.) To require of a probate judge the performance of the duties imposed by said chapter 8, none of which pertain to the judicial office, and for the performance of which the judge must leave his court room and enter an office separate from his own and there perform purely ministerial acts for several days in each year, is in the nature of attempting to put upon him the duties of another office, although in the discharge of such new duties he still may be styled a probate judge. In the performance of such duties he is not acting as a judge or as a court. Therefore we cannot say in this proceeding that the defendant's right to hold the office of probate judge and enjoy the powers and emoluments thereof, depends upon a faithful discharge of the duties imposed by the statute above cited. If the defendant has failed or neglected to do something which said statute requires, he may, perhaps, be removed from such new office or position; but because he does not comply with that statute, he has not forfeited his office as probate judge, and therefore cannot be removed therefrom under the allegations of the petition.

Roll v. Murray.

The State, ex rel. the Atty. Gen., v. The Judges of the Court of Common Pleas, 21 Ohio St. 1, to which we are referred, is not in accordance with the prior adjudications of this court.

The demurrer will therefore be sustained.

All the Justices concurring.

35	171
41	178
41	180
41	183

ROLL, THAYER, WILLIAMS & CO. V. J. H. MURRAY.

ATTACHMENT BEFORE JUSTICE; Order not Appealable. In an action before a justice of the peace an attachment was discharged, and afterward a judgment was rendered in favor of the plaintiff and against the defendant upon the merits, and afterward the plaintiff filed an appeal bond attempting to take an appeal both from the judgment of the justice upon the merits, and from the order of the justice discharging the attachment; and the appeal bond was sufficient for both purposes, if an appeal from an order of a justice of the peace discharging an attachment is allowable under the statutes. In the district court that portion of the appeal which had for its object the giving to the district court power to review and retry the attachment proceedings instituted before the justice of the peace was dismissed. *Held*, Not error; that an order of a justice of the peace discharging an attachment is not appealable.

Error from Jefferson District Court.

At the February Term, 1885, of the district court, the defendant *Murray* moved to dismiss that part of the plaintiff's appeal which had for its object the review of the order of the justice of the peace dissolving the attachment, which motion the court sustained. This ruling the plaintiffs bring here for review.

Jackson & Royse, for plaintiffs in error.

Louis A. Myers, Henry Keeler, and Mills & Wells, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Henry E. Roll, Norton Thayer, Thomas R. Williams and J. B. Welsh, partners as Roll, Thayer, Williams & Co., before a justice of the peace of Jefferson county, to recover \$265.89 from J. H. Murray. At the time of the commencement of the action, an order of attachment was obtained, which was afterward levied upon certain property of the defendant. Afterward, and upon the motion of the defendant, the attachment was dissolved. The case then came on for hearing upon its merits, and judgment was rendered in favor of the plaintiffs and against the defendant for \$126.55. Afterward, and within proper time, the plaintiffs filed an appeal bond, attempting to take an appeal both from the judgment of the justice upon the merits and from the order of the justice discharging the attachment; and the appeal bond was sufficient for both these purposes, if an appeal from an order of a justice of the peace discharging an attachment is allowable under the statutes. The case was then removed to the district court, and afterward the defendant moved to dismiss that portion of the appeal which had for its object the review of the order of the justice of the peace dissolving the attachment, which motion was sustained by the district court. The case was then tried upon its merits by the court, without a jury, and judgment was rendered in favor of the plaintiffs and against the defendant for \$262.09 and costs; and the plaintiffs now bring the case to this court for review.

The only question presented by the plaintiffs in error to this court is whether the district court erred, or not, in dismissing that portion of the plaintiffs' appeal which had for its object the giving to the district court power to review and retry the attachment proceedings instituted before the justice of the peace.

The statutes with reference to appeals, so far as it is necessary to quote them, read as follows:

"SEC. 120. In all cases, not otherwise specially provided

Opinion of the Court.

for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered.

"SEC. 121. The party appealing shall, within ten days from rendition of the judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned," etc. (Justices Code, §§ 120, 121.)

It will be seen that an appeal can be taken only from a "final judgment," and the appeal can be taken only after the "judgment" has been rendered, and only within ten days after the "judgment" has been rendered, and the amount of the appeal bond must not in any case be "less than double the amount of the *judgment* and costs." And when the case is taken to the district court on appeal, it "shall be tried *de novo* in the district court upon the original papers on which the case was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made or new pleadings to be filed." (Justices Code, § 122.) There is no provision in the statutes for taking an appeal from the

order, when not
appealable. order of a justice of the peace in any provisional remedy or in any ancillary proceeding, and no provision anywhere for retrying in the district court upon an appeal from a justice of the peace, any question that pertains only to some provisional remedy, or to some ancillary proceeding. The appeal is from a final judgment only, and from a judgment on the merits only, and the trial afterward to be had on the appeal is only upon the merits. It has already been decided by this court that an ordinary appeal bond, given by the plaintiff after a judgment has been rendered by a justice of the peace, will not carry to the district court attachment proceedings instituted in the justice's court, where the justice has discharged the attachment, (*Gates v. Sanders*, 13 Kas. 411,) nor garnishment proceedings in like cases, (*Brown v. Tuppeny*, 24 Kas. 29,) nor attachment proceedings in like cases where the appeal is attempted to be taken before any judgment is rendered upon the merits of the case, the dissolution of the

Roll v. Murray.

attachment not being considered as a "final judgment," (*Butcher v. Taylor*, 18 Kas. 558,) and an appeal by the defendant from the final judgment of a justice of the peace will not carry attachment proceedings in the case to the district court, but will discharge the attachment. (*St. J. & D. C. Rld. Co. v. Casey*, 14 Kas. 504.)

Counsel for plaintiffs in error do not ask us to overrule any of the foregoing cases; hence we suppose they admit that an ordinary appeal bond will not carry proceedings in attachment from a justice of the peace to the district court, nor will an appeal bond given expressly for such a purpose do so where no final judgment has yet been rendered by the justice of the peace upon the merits of the case. But their claim is that an appeal bond, executed after the attachment has been dissolved and after the final judgment has been rendered upon the merits of the case, and within ten days after the rendition of such final judgment, and executed for the express purpose of appealing from both the order discharging the attachment and the final judgment, will carry both the case upon its merits and the attachment proceedings to the district court, where both can again be heard and determined. But suppose the attachment was dissolved more than ten days or more than fifty days before the final judgment was rendered: then would it be claimed that it could be taken to the district court on an appeal along with the case on its merits when it could not be taken separately or by an ordinary appeal bond? In our opinion, attachment proceedings cannot be taken to the district court at all on appeal; and it therefore follows that the order and judgment of the district court are correct, and the same will be affirmed.

All the Justices concurring.

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. C. E. WILSON, as Treasurer of Hodgeman County, et al.

TAXES — Equalization — Correcting Assessment. The county board of equalization is authorized at its meetings held in the month of June of the odd years, when proper notice has been given, to correct and equalize the assessment made in those years under § 69 of the tax law, of real property that has become taxable since the regular assessment of such property in the even years, and therefore at such time the owners of such property have an opportunity for a hearing at which to contest the legality and justice of the assessment.

Error from Hodgeman District Court.

ACTION brought by *The Railroad Company* to restrain the collection of certain taxes. It brings here for review a judgment against it, rendered October 28, 1884. The opinion states the material facts.

James Hagerman, A. A. Hurd, and Robert Dunlap, for plaintiff in error; *Geo. W. McCrary*, general counsel.

W. S. Kenyon, county attorney, and *M. W. Sutton*, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J.: In February, 1883, the boundaries of Hodgeman county were changed by legislative enactment so as to embrace considerable territory that had theretofore constituted a part of the unorganized county of Gray, and which before that time was not subject to taxation. The Atchison, Topeka & Santa Fé Railroad Company owned several tracts of land in the territory attached, and in the spring of 1883 the assessors of Hodgeman county assessed this land of the company, and it was placed on the tax-roll, and a levy was made thereon by the county commissioners of Hodgeman county for the taxes of that year. The railroad company brought this action against the county treasurer and county commissioners of

A. T. & S. F. Rld. Co. v. Wilson, *Treas.*

Hodgeman county, alleging that the assessment was made without authority, and that the taxes levied upon its lands were wholly illegal and void, and asked for an injunction to restrain the collection of such taxes. A temporary injunction was granted. Afterward the defendant filed a demurrer to the petition, which upon the hearing was sustained, and the injunction dissolved. This ruling is assigned for error here.

The validity of the tax is challenged by the plaintiff on the ground that the assessment of its land having been made in an odd year, it was not afforded a hearing or an opportunity to contest the justice of the assessment. We cannot concur in this claim. It is true that § 43 of the tax law provides for a biennial assessment of real property, but § 69 of the same law provides that—

“Each township and city assessor shall annually, at the time of taking the list and valuation of personal property, also take a list of all real property situated in the county that shall have become subject to taxation since the last previous listing of property therein, with the value thereof estimated agreeably to the rules prescribed for the listing and assessing of real estate; . . . and shall make return thereof to the county clerk at the same time he is required by law to make his return of personal property,” etc.

It is insisted that the board of equalization can only meet to equalize the assessment of real property in the even years when real property is regularly assessed, and therefore that the assessment of real property in the odd years provided by § 69 cannot be revised or equalized by the board. It is true that § 74 requires that there shall be a meeting of the board of equalization for that purpose on the first Monday in June of the even years, but it does not forbid a meeting at other times when there may be a necessity therefor. Section 73 reads as follows:

“The board of county commissioners of each county shall constitute a county board of equalization, and the county clerk shall be the clerk of said board.”

This provision is broad and general, and unless limitations are elsewhere prescribed, it would authorize the board thus

Opinion of the Court.

constituted to equalize or correct the assessment of real estate at any time when proper notice had been given that such action could or would be taken. With respect to the equalization of the valuation of personal property, a limitation is prescribed in § 74, where it provides that —

“The board shall meet on the first Monday of June of each year and proceed to equalize the valuation of the personal property of their county, and may adjourn from time to time for said purpose *not beyond ten days* from the first day of their session.”

Under this limitation it may well be doubted whether the board can meet for the purpose of equalizing the personal-property valuations after the ten-days limit has expired. But when the legislature came to prescribe rules for the government of the board in regard to the time and manner of equalizing the valuation of real property, there was no such limitation made. The rules affecting real-estate valuations are found in the same section with the limitation mentioned. The fixing of the limit in the one case and the studied omission of such a provision in the other, indicates that the legislature did not intend to restrict the board in correcting and equalizing the valuation of real property to the meeting held on the first Monday of June of the even years. Besides, by § 75 it is made the duty of the county clerk to give a newspaper notice in May of every year that the board will meet on the first Monday of the following month, and that at such meeting all persons feeling themselves aggrieved can appear and have all errors in the return corrected. As has been seen, the return made by the assessor in the odd year embraces, in addition to the listing and valuation of personal property, an assessment of all real property that has become taxable since the regular assessment of such property the preceding year. The notice is not that the errors in that part of the return relating to the valuation of personal property will be corrected, but that *all* persons may appear and have *all* errors in the return corrected. These sections taken together furnish authority to the board of equalization to correct any errors in the assessment of real

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estate made under § 69 in the odd years. That being so, the plaintiff had an opportunity for a hearing, and to contest the fairness and justice of the assessment. The judgment of the district court will therefore be affirmed.

All the Justices concurring.

R. D. McCROSSEN V. EDMOND HARRIS, *et al.*

MORTGAGE, Merged into Judgment; Subsequent Taxes. Where a mortgage of real estate is merged into a judgment, which includes all the taxes due upon the land at the date of its rendition, the payment by the judgment creditor of taxes accruing on the premises after the judgment will not constitute a separate and independent lien on the land, which can be enforced by action, after the judgment debtor has satisfied the judgment, interest, and costs.

Error from Wyandotte District Court.

ACTION brought by *McCrosen* against *Harris* and others, to recover taxes paid by plaintiff upon certain lots, and to have the same declared a lien thereon. Judgment for defendants at the December Term, 1884. The plaintiff brings the case here. The facts sufficiently appear in the opinion.

D. B. Hadley, for plaintiff in error.

Nathan Cree, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: Edmond Harris and his wife Maria, on June 2, 1880, executed a mortgage to R. D. McCrosen upon lots 3 and 4, in block 94, in the city of Wyandotte, in this state, to secure the payment of a note for \$275 with interest. On January 3, 1883, McCrosen obtained a judgment of foreclosure of the mortgage, and in the judgment the taxes then due on the premises were decreed to be a lien thereon. It was

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also provided in the decree that if McCrossen should pay such taxes, he should be repaid out of the sale of the property. Appraisement having been waived in the mortgage, the sale, under the decree of foreclosure, was stayed six months. A sale was made December 3, 1883, but on account of informalities this was set aside. On December 20, 1883, McCrossen paid \$41.58 for taxes upon the premises upon which the judgment was a lien. On February 15, 1884, he filed his precipe for an *alias* order of sale upon the judgment, but before it was placed in the hands of the sheriff, Edmond Harris paid off the judgment, interest and costs, and all taxes up to and including those assessed for 1882, but refused to repay plaintiff the taxes of 1883. This action was brought to recover the taxes so paid by him, and to declare the same a lien upon the premises. The premises were subsequently sold to George Gruble, and Gruble and his wife mortgaged the property to Adeline Crane to secure the sum of \$500. The petition charged that George Gruble and Adeline Crane took their conveyances with full knowledge of the alleged lien of McCrossen.

At the time the plaintiff paid the taxes, the mortgage had been extinguished by being merged into the judgment; therefore the taxes were not a lien in connection with the mortgage. Therefore no action can be maintained to recover these taxes upon any of the covenants of the mortgage, nor upon the provisions of § 148, ch. 107, Comp. Laws of 1879, permitting a mortgagee to pay taxes where the mortgagor fails or neglects so to do. (*Vincent v. Moore*, 17 N. W. Rep. 81; *Hitchcock v. Merrick*, 18 Wis. 375; *Johnson v. Payne*, 11 Neb. 269.) After the judgment was rendered, the amount thereof was a specific lien upon the real estate described therein. Under some circumstances perhaps a party might pay the taxes for the protection of his lien, and for such payment equity might give him a lien in connection with the judgment; but such a case is not presented. All of the taxes prior to 1883 were included in the judgment. For the protection of his judgment lien, it was not necessary to pay the taxes of 1883. Section 56, of

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chapter 107, Comp. Laws of 1879, provides that where any real estate is sold at judicial sale, the court shall order all taxes and penalties thereon against the land to be discharged out of the proceeds of the sale. Therefore if the plaintiff had not paid the taxes of 1883, and if a sale had been made of the premises, the taxes would have been satisfied out of the proceeds. (Sec. 56, ch. 107, *supra*.) If the plaintiff had not paid the taxes at the time the judgment debtor paid the judgment and costs, the taxes would no longer have been of any concern to him. There is no allegation in the petition that the real estate was insufficient security for the judgment lien, or any other special facts set forth showing the necessity for the payment of the taxes, after judgment, to protect the judgment lien. Under the circumstances, we must regard the payment of the taxes by plaintiff as voluntary, and such payment will not support an action to constitute the taxes so paid a separate and independent lien on the land. It seems very unjust that the plaintiff should pay these taxes and not be able to recover the amount thereof. But as the payment must be regarded as voluntary, the law does not give a remedy.

The judgment of the district court will be affirmed.

All the Justices concurring.

LOUIS SARBACH V. MARY NEWELL, *et al.*

1. **PARTITION; Apportionment of Costs.** The plaintiff owned two-elevenths of a certain city lot, not including the enhanced value of the lot by reason of a building thereon, and the defendants owned the other nine-elevenths of the lot, and were also entitled to the enhanced value thereof by reason of said building. The plaintiff's interest in the entire property with respect to the defendants' interest was as 48 is to 997. *Held*, In an action for partition, that under § 628 of the civil code the costs, attorney's fees and expenses should be apportioned between the parties according to their respective interests in the entire property.

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2. **SALE; Distribution of Proceeds.** In such action, where the property could not be partitioned without manifest injury thereto, but was sold, *held*, in pursuance of the foregoing statute and the decision of the supreme court formerly made in the case, (*Sarbach v. Newell*, 80 Kas. 102, 104,) that out of the proceeds of the sale, the costs, attorney's fees and expenses should first be paid, and then that the remainder of the proceeds should be divided between the parties according to their respective interests in the property.

Error from Jackson District Court.

ACTION brought by *Sarbach* against *Newell*, for the partition of certain real estate. The plaintiff brings to this court for review a certain order of distribution made by the district court at the June Term, 1884.

Lowell & Walker, and *Hayden & Hayden*, for plaintiff in error.

W. S. Hoaglin, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Louis Sarbach against Mary Newell and Samuel H. Newell to have certain real estate situated in the city of Holton, Jackson county, partitioned between them. On June 16, 1882, judgment was rendered in the case partitioning the property as follows:

"To the plaintiff, two-elevenths part of said premises without the stone store building thereon, if the same can be done without manifest injury; but if such partition cannot be made without manifest injury, then that said commissioners shall appraise the value of said lot, without the said stone store building, and make a report of their proceedings to the court forthwith. It is further decreed, that in case the plaintiff shall elect to take the property, he shall pay the found value of said stone store building, nine-elevenths of the appraised value of the lot, and his proportionate share of the costs and attorney's fees to be taxed; and in case the defendants shall elect to take the property at its appraised value, they shall pay two-elevenths of the appraised value of the lot, and nine-elevenths of the costs and attorney's fees herein to be taxed. It is further adjudged and decreed, that in case of a sale of

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said property the proceeds arising from such sale shall be applied as follows, to wit :

"1. In payment of the costs of this proceeding, including attorney's fees, hereafter to be ascertained and taxed.

"2. That said defendants be paid that proportion of the residue which the found value of said stone store building shall bear to the appraised value of the lot, and the balance then remaining shall be divided as follows: Two-elevenths to the plaintiff, and nine-elevenths to the said Mary Newell."

At the July term of the supreme court in 1882 this judgment was affirmed. (*Sarbach v. Newell*, 28 Kas. 642.) Afterward, and at the January term of the supreme court in 1883, on a motion for a rehearing, the judgment of the district court was modified, by an order of the supreme court, as follows :

"The order of the district court for the commissioners making partition to set off to the plaintiff the two-elevenths part of the premises without the stone store building thereon, if the same can be done without manifest injury, must be affirmed. But if partition cannot be made without manifest injury, the commissioners must appraise the value of the lot without the stone store building, and also the value of the lot with all the improvements thereon. The difference between the value of the lot without the stone store building and the value of the lot as improved, will be the amount which the improvements add to the value of the premises, or, in other words, will be the enhanced value of the property resulting from the improvements erected thereon.

"The proceeds of the sale of the premises must be applied as follows: First, the costs as adjudged by the district court; second, the said defendants shall receive that proportion of the residue which the enhanced value of the premises, resulting from the improvements, shall bear to the appraised value of the lot; and the remainder of the proceeds shall be divided as decreed by the district court. As the taxes on the vacant lot have equaled the annual net value of the rents, issues and profits thereof, and as the taxes have been paid by the defendants, the plaintiff is not entitled to recover any sum for rents, issues or profits, or any damage for the withholding of the premises." (*Sarbach v. Newell*, 30 Kas. 102, 104.)

Afterward, the commissioners appointed to partition the property examined the same, and reported to the district court

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that the same could not be partitioned without manifest injury; and they also appraised the lot without the stone store building at \$1,200, and the lot with all the improvements thereon at \$4,750. The report of the commissioners was filed in the district court on February 29, 1884. Afterward, and on March 21, 1884, the case came on for further hearing in the district court, when the following proceedings were had, to wit:

“And thereupon and then and there the defendants offer to take the said property at the appraisers’ value. And then and there the plaintiff offers to take the same at the appraised value. And thereupon the defendants in open court withdraw their offer. And then and there the plaintiff withdrew his offer. And then and there the defendants offered again to take the said property at the appraised value. And thereupon the plaintiff offered to take the said property at its appraised value, and asked for an order of sale. And thereupon it is ordered and adjudged by the court, that the sheriff of Jackson county proceed to advertise and sell said property,” etc.

On May 31, 1884, the sheriff sold the property to Samuel H. Newell, for \$4,500. On June 21, 1884, on motion of the defendants, the sale was confirmed; and thereupon the court ordered the proceeds thereof to be distributed as follows:

“To the defendants herein, their share as and for the stone store building the sum of \$3,363.15; and that from the balance the proportional share which said lot brought at said sale, \$1,136.85, be paid: First, the costs, including attorney’s fees, \$225, (one-half to be paid to plaintiff’s attorneys, and one-half to defendants’ attorneys;) and the balance to be paid, two-elevenths to the plaintiff, and to the defendants nine-elevenths of the residue of said proceeds or share.”

Of this order of distribution the plaintiff complains, and brings the case to this court for review. He claims that the costs, attorney’s fees and expenses should be first paid out of the entire proceeds of the sale of the property, and then that the remainder of the proceeds should be divided between the plaintiff and the defendants in proportion to their respective interests in the property; while the court in effect ordered that the defendants should be first paid their share resulting

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from the enhanced value of the property by reason of the stone store building, without such share being subject to the payment of any of the costs, attorney's fees, or expenses accruing in the litigation, and then that the costs, attorney's fees and expenses of the litigation should be paid from the remainder of the proceeds. In other words, the plaintiff claims that the costs, attorney's fees and expenses should be first paid, and then that as the value of the lot without the stone store building was $\frac{1}{4}$ of the entire value of the property, and that as the enhanced value of the lot resulting from the stone store building was $\frac{3}{4}$ of the entire value of the property, and that as he owned $\frac{1}{4}$ of the lot, he should receive $\frac{1}{4}$ of $\frac{3}{4}$ or $\frac{3}{16}$ of the remainder of the proceeds; and that the defendants, who owned $\frac{3}{4}$ of the lot and were entitled to all the enhanced value resulting from the stone store building, should receive $\frac{3}{4}$ of $\frac{3}{4}$ and $\frac{3}{4}$ of $\frac{3}{16}$ of the remainder of the proceeds; or, in other words, that the amount which the plaintiff and defendants should receive respectively after the costs, attorney's fees and expenses were paid, should be as 48 is to 997. Under this view the plaintiff claims that he should pay only $\frac{1}{16}$ or less than $\frac{1}{4}$ of the costs, attorney's fees and expenses, while under the order of the court below he is required to pay $\frac{1}{4}$ of the same. The statute relating to costs in actions for partition reads as follows:

"SEC. 628. The court making partition shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties, according to their respective interests, and may award execution therefor, as in other cases." (Civil Code, § 628.)

We think the claim of the plaintiff is substantially correct, both under the statute and under the order of the supreme court made at its January term, 1883. (*Sarbach v. Newell*, 30 Kas. 104.) The costs, attorney's fees and expenses should first be paid out of the entire proceeds of the sale of the property, and then the parties should receive their respective shares out of the remainder of the proceeds. By such a distribution and apportionment, the costs, attorney's fees and expenses, as

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well as the amounts to be paid to the parties, would be apportioned "among the parties according to their respective interests."

The order of apportionment made by the court below on June 21, 1884, will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

35	185
38	640
35	185
53	118
35	185
55	588

THE ST. JOSEPH & WESTERN RAILROAD COMPANY V.
DEWITT C. WHEELER.

1. *PASSENGER on Construction Train; Reasonable Care.* W., a boy thirteen years of age, asked and obtained leave to ride upon a construction train from the conductor, who had been instructed by the railroad company not to permit passengers to ride on his train, but the instruction had not been communicated to W. The train had a caboose car attached, such as are attached to the freight trains of that road, and upon which passengers are carried. It also appeared that notwithstanding the instruction mentioned, passengers were frequently carried on that and other construction trains. While W. was riding upon the caboose, a collision with another train occurred through the negligence of the railroad company, which resulted in W.'s death. *Held*, That under the circumstances W. was lawfully upon the train, and the company was held to the exercise of reasonable care and diligence toward him.
2. ——— *Implied Authority of Conductor.* It being customary to carry passengers upon the construction trains, persons having no notice of a contrary rule of the company, had a right to assume that the conductor had authority to carry persons on such trains, and that the granting of permission by him fell within his general authority as manager of the train.
3. *MINOR CHILD — Manumission — Damages.* In a suit to recover damages for the death of a minor under § 422 of the code, the fact that the parents had released to such minor his time and services during his minority, may properly be considered by the jury in determining the amount of recovery, but it will not prevent the parents from recovering any pecuniary damages, such as the loss of support, that they may be able to prove resulted from his death.

Error from Doniphan District Court.

ACTION by *De Witt C. Wheeler*, as administrator of the estate of Frank Wheeler, deceased, against *The Railroad Company*, to recover damages for the benefit of the next of kin of the decedent, whose death is alleged to have been caused by the negligence of the defendant. Trial at the December Term, 1884, and judgment for plaintiff for \$1,500. *The Company* brings the case here. The material facts are stated in the opinion.

Doniphan & Reed, and *T. W. Heatley*, for plaintiff in error.

W. D. Webb, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: De Witt C. Wheeler, as administrator of the estate of Frank Wheeler, deceased, brought this action under § 422 of the civil code, to recover damages for the benefit of the next of kin of Frank Wheeler, whose death, it is alleged, was caused by the gross carelessness and negligence of the St. Joseph & Western Railroad Company. There was but little dispute concerning the facts of the case. On June 17, 1881, the defendant below was operating a railroad which runs from Elwood westward through Doniphan and other counties of Kansas to Grand Island, Nebraska. On that day a work or construction train with a caboose car attached, was sent from Elwood to a point near Troy, for the purpose of being loaded with dirt to be brought back for the repair of the road-bed between Wathena and Elwood, with instructions to work until ten o'clock in the morning without regard to train No. 7, a freight train going west. While the train was being loaded, Frank Wheeler, in company with another boy, came up to the construction train, and learning that it was soon going eastward, asked the conductor if he might ride back. The conductor consented, and Frank Wheeler rode in the caboose car with other persons that belonged to the train. He paid no fare, and was not asked or expected to pay any. Soon after

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he was taken on, the construction train backed eastwardly toward Wathena, and before reaching that place, and at 9:45 A. M. of that day, it collided with the engine of train No. 7 going westward, in which collision Frank Wheeler was killed. The conductor of the construction train had instructions from the railroad company not to allow persons as passengers to ride upon his train except those who belonged to it, but this instruction was not communicated to Frank Wheeler. Upon these and some other facts which were shown upon the trial, a verdict for \$1,500 was given in favor of the plaintiff.

One of the questions raised is, that there was no correspondence between the pleadings and the evidence. The point is made that the plaintiff alleged that Frank Wheeler was a passenger, a term which it is claimed implied that Frank Wheeler was traveling in a public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor, while the evidence offered showed that he was carried on a train not designed for passengers, that no fare was collected or expected to be paid, and therefore that he did not stand toward the company in the relation of a passenger. This is one sense in which the term is used, but not the only one. It is commonly applied to anyone who travels in a conveyance, or who is carried upon a journey, irrespective of the character of the conveyance or of compensation to the carrier. While the plaintiff alleged that Wheeler was carried as a passenger, he nowhere averred that he was carried for hire, nor can it be said that the petition was framed upon the theory that there was a contract relation between deceased and the company. It was rather upon the theory that he was not a trespasser upon the defendant's train, and it is specially alleged that he was upon the train with the knowledge and consent of the conductor. From this averment it is manifest that the pleader did not rely upon any agreement between the company and Wheeler, and did not intend to hold the company to extraordinary care, as it would be held in carrying persons who were passengers in a strictly legal sense; but rather, that as Wheeler was upon

the train with the consent of the conductor, he was not wrongfully there, and the company owed him the duty of ordinary care. The action was founded upon the neglect of the company and not upon the breach of a contract; and allegations of the relation which he occupied toward the company are only material for the purpose of determining and fixing the grade of care owing to him by the company. As we interpret the petition, it did not allege that the relation of carrier and passenger existed by reason of an agreement between the deceased and the company, and therefore that there was no substantial variance between the pleadings and the evidence.

A series of instructions were prepared by the railroad company and disallowed by the court, and their refusal is assigned as error. Most of them in effect instructed a verdict in favor of the defendant, and asserted that the company cannot be held

1. Passenger on construction train; reasonable care.

liable for injury to one who rides upon a construction train with the consent of the conductor, and who is not a passenger in the ordinary sense.

They were properly refused. We concur with the view of the law taken by the trial judge where he states that:

"Under the admitted facts and the evidence in the case, the said Frank Wheeler was not a trespasser upon defendant's train, although he was not in legal contemplation a passenger. A common carrier of passengers is bound to exercise extraordinary care towards its passengers, and is liable for slight negligence, but it does not owe the same degree of care to a person on one of its vehicles or trains, who does not stand in the relation of a passenger. To such persons a carrier owes only the duty of ordinary care, which is that degree of care which persons of ordinary prudence would usually exercise under like circumstances."

It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company, for two reasons: First, that the conductor had instructions not to carry passengers on the construction train; and second, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be car-

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ried thereon. Neither of these circumstances will defeat a recovery in this case. It is true the conductor had been instructed not to allow persons to ride upon his train as passengers, but Frank Wheeler had no knowledge of such instruction. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employé, the argument made by counsel might apply.

In *Dunn v. Grand Trunk Rly.*, 58 Me. 187, the plaintiff went on board a freight train with the knowledge of the conductor. One of the regulations of the company prohibited conductors from allowing passengers to travel upon its freight trains. He was not directed or requested to leave, but paid the usual fare to the conductor, and during the journey the car upon which he rode was thrown from the track and he was thereby injured. The court held that under the circumstances he had a right to suppose himself rightfully on board, and that if the act of the passenger did not conduce to the injury received, the company was responsible for the consequences of its negligence or want of care. *C. & A. Rld. Co. v. Michie*, *Adm'x*, 83 Ill. 427, was an action by the administratrix to recover damages for the death of her husband, which occurred while he was riding upon an engine. The rules of the company provided that no persons except the road master and conductor of the train were allowed to ride on the engine without the permission of the superintendent or master mechanic. He applied to the engine driver and was given permission to ride. It was ruled that the driver of the engine occupied only a subordinate position, and that his permission was not the permis-

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sion of the company, as he had no power to give it; but it was added that—

“Had the conductor of the train given the permission, or knowing the deceased was upon the engine suffered him there to remain, it might be considered the act of the company, as the conductor has control of the entire train, and his act is rightfully regarded as the act of the company.”

In the case of *Wilton v. Middlesex Rld. Co.*, 107 Mass. 108, several young girls were invited by the driver to ride upon one of the defendant's cars. They got upon the front platform, and the driver immediately struck his horses, when by reason of their suddenly starting, the plaintiff lost her balance and fell so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car unless such authority was implied from the fact of his employment as driver. In deciding the case the court said:

“The driver of a horse car is the agent of the corporation having charge in part of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duty, but is one within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.”

In *Lucas v. Milwaukee & St. P. Rly. Co.*, 33 Wis. 53, it was held that if a person rode upon a freight train without authority from some person competent to give it, he would have been unlawfully there, and could not have successfully enforced the rights of a passenger against the company, but the company had authorized the carriage of passengers upon some of its freight trains, and therefore a different ruling was applied. It was stated that—

“By making a portion of its freight trains lawful passenger trains, the defendant has, so far as the public is concerned, apparently given the conductors of all its freight trains authority

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to carry passengers, and if any such conductor has orders not to carry passengers upon his train, they are or may be in the nature of secret instructions limiting and restricting his apparent authority, and third persons are not bound by such instructions until informed thereof."

In support of the same view, we cite *Jacobus v. St. Paul & Chicago Rly. Co.*, 20 Minn. 125; *O. & M. Rld. Co. v. Muhling*, 30 Ill. 9; *Gradin v. St. Paul & Duluth Rly. Co.*, 30 Minn. 217; 11 Am. and Eng. Rld. Cases, 644; *Lawson v. C. St. P. M. & O. Rld. Co.*, 21 Am. and Eng. Rld. Cases, 249.

Eaton v. D. & L. W. Rld. Co.; 57 N. Y. 383, is relied upon as an authority for the position assumed by the company. The circumstances of that case are not like the one before us, and the decision is based on the special circumstances of the case. It differs materially in its facts from the one at bar. There, the party injured was invited by the conductor to ride upon a freight train with the promise to get him employment as a brakeman; and besides, it did not appear that passengers were either habitually or occasionally permitted to ride upon the freight trains of that company. Here, although disputed, it was satisfactorily shown that passengers were not only occasionally but commonly carried upon the freight and construction trains of the defendant. A. J. Shuster, who was employed upon the construction train at the time that Frank Wheeler was killed, testified that passengers were carried upon that train under certain circumstances. Albert Hinchman, who had been on the train three or four months, stated that the company had always carried passengers on all its freight trains while he was upon the road, and that passengers had frequently ridden on the construction train, and had frequently been taken on at points other than stations where the train was at work. Henry Wheeler states that prior to the accident he rode upon the construction train to Wathena, and paid fare to the conductor for such ride. A. J. Mowry, who traveled a great deal upon defendant's road, testified that it was usual to carry passengers on all caboose cars; that he rode on every kind of train that was ever on the road, and had ridden on

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defendant's construction trains before June 17, 1881, and paid fare to the conductor. It will thus be seen that it was customary for passengers to ride, with the permission of the conductor, upon all freight and construction trains upon the defendant's road; and the New York case, while similar in some of its features, is not an authority here. Persons not

2. Implied authority of conductor. informed of the instructions given to the conductor, had a right, under this prevailing practice, to assume that the conductor had authority to

carry passengers on the construction train, and that the granting of permission by him in such cases fell within his general authority as manager of the train. Nor was there anything in the exterior appearance of the car in which the deceased rode to notify him that passengers were not carried therein. The testimony is that it was a caboose car similar in construction and appearance to those which were attached to all of defendant's freight trains, and upon which, as has been seen, passengers were carried.

The railroad company asked an instruction that if the father of Frank Wheeler had prior to the accident relinquished unto him the right to his time and services during his minority, and that this relinquishment was unrevoked at his death, the plaintiff can recover only nominal damages. It was properly rejected. In such an action the plaintiff does not sue for his

3. Manumission of minor child; death; damages. own benefit, but only as the personal representative of the deceased. The damages recovered

inure to the exclusive benefit of the widow and children if there are any, and if not, to the next of kin. In this case the damages were for the benefit of the next of kin, who were the father and the mother. The sum to be recovered was therefore not for the benefit of the father alone, who may have made the relinquishment, but for the mother also. Besides, parents may recover for the death of a child who has attained his majority if they can prove any pecuniary damages resulting therefrom, such as the loss of support. In estimating the pecuniary benefit which would accrue to his parents by the continuance of his life, the fact that the parents relin-

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quished to Frank Wheeler his time and services during his minority, was an element which might properly be taken into consideration; and this much was stated to the jury.

None of the other objections raised are at all tenable, and as the charge given fairly presented the law of the case to the jury, the errors assigned will be overruled, and the judgment will be affirmed.

All the Justices concurring.

THE McCUNE MINING COMPANY V. W. B. ADAMS.

1. CHARTER—*Copy as Evidence.* A copy of the charter of a corporation created under the laws of this state, duly certified by the secretary of state, under the seal of the state, is evidence of the creation of such corporation.
2. CORPORATION—*Questioning Existence.* In an action by a mining company against a subscriber of stock for installments upon his subscription for stock of the corporation, such subscriber or stockholder cannot, in a collateral way, question the existence of the corporation, or the regularity of its organization.

Error from Crawford District Court.

ACTION by *The McCune Mining Company* against *Adams*, to recover \$95. Judgment for defendant, at the September Term, 1884. The plaintiff brings the case here. The opinion states the facts.

Cowley & Wiswell, for plaintiff in error.

John T. Voss, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action commenced by The McCune Mining Company against W. B. Adams, before a justice of the peace of Crawford county, to recover from the defendant the sum of \$95, alleged to be due the plaintiff from

the defendant upon his subscription to the capital stock of that company. Judgment was given before the justice against the plaintiff and in favor of the defendant, and an appeal taken to the district court. Upon the trial, after the plaintiff had produced all its testimony, the defendant demurred thereto, which demurrer was sustained by the court. Of this complaint is made.

It appears from the briefs before us that the district court decided that no testimony was introduced upon the trial showing or tending to show that the company had any legal existence as a corporation. The specific objection to the existence of the corporation is that it was not shown that the charter was subscribed by three persons who were citizens of this state. The plaintiff introduced in evidence a copy of its charter, duly certified by the secretary of state, and supplemented this testimony with proof of the election and qualification of the directors of the company, the adoption of by-laws by the company, and other evidence tending to show that the subscribers of the charter took all the steps supposed by them necessary to complete the incorporation. Stock was subscribed, assessments upon the stock were made, and notices of such assessments given to the stockholders. The stock book of the company, offered in evidence, showed that the defendant, on January 18, 1884, subscribed for one share of the capital stock of the company and attached his signature thereto. Notices were properly directed and mailed to him of the assessments upon the stock subscribed by him.

The statute provides that "a copy of the charter, or of the record thereof, duly certified by the secretary of state, under the great seal of the state, shall be evidence of the creation of the corporation." (Comp. Laws of 1879, ch. 23, § 9.) Therefore it was unnecessary to offer any evidence showing that the subscribers to the charter were citizens of the state. In addition to this, the defendant is estopped from denying the existence of the corporation at the time he contracted with it as such. A party cannot be permitted, in a collateral way, to question the regularity of the organization of a corporation. (*Pape v.*

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Bank, 20 Kas. 440; *Rice v. Railroad Co.*, 21 Ill. 93; *Brookville &c. Company v. McCarty*, 8 Ind. 392; *Baker v. Neff*, 73 id. 68.) Thompson, in his excellent work on the Liability of Stockholders, says:

“If a person, when sued by a corporation, pleads *nul tiel corporation*, the production of the certificate of incorporation which has been filed, and proof of *user*, and possibly proof of user alone, will be sufficient evidence *prima facie* of the fact that it is a corporate body in fact as well as in name. The rule extends further: A person who has contracted with a body in writing, by a corporate name, when sued upon the instrument in the same name, is estopped to deny that the payee or obligee is such a corporation.” (§ 407.)

The bill of particulars so clearly states a cause of action that it is unnecessary to comment thereon. It is contended that some of the evidence admitted by the court was incompetent. The defendant has filed no cross-petition in error, and the question as to the competency of evidence admitted by the trial court is not relevant. We have examined the other questions presented, and upon a careful consideration of the same, perceive no good reason for the action of the court in sustaining the demurrer to the evidence. (*Bequillard v. Bartlett*, 19 Kas. 382; *Merkel v. Smith*, 33 id. 66; *Christie v. Barnes* 33 id. 317.)

The judgment of the court below will be reversed, and the cause remanded for a new trial, and with the direction that the court overrule the demurrer to the evidence.

All the Justices concurring.

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LEANDER DAVIS V. PATRICK HARRINGTON.

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| 35 | 196 |
| 72 | 362 |
| 35 | 196 |
| 80 | 363 |
| 35 | 196 |
| 81 | 62 |
| 81 | 72 |
1. **TAX DEED, Sufficient.** Where a tax deed follows the statutory form, and states that the land was sold by the county treasurer at a sale begun and publicly held "at the county seat of said county," and does not state that the land was sold "at public auction at his office," but the sale was in fact at public auction at the treasurer's office, *held*, that the tax deed, unless void for some other reason, is sufficient.
 2. **TAX SALE, Not Void.** Where the bidders at a tax sale do not bid against each other, but still there was no agreement or understanding between them that would prevent competition or bidding by any person who desired to bid, *held*, that the sale is not void because of any unlawful combination among the bidders.
 3. ——— **Loss of Notice and Proof.** Where notice of the sale was properly given and proper proof thereof made, and the notice and proof were properly filed as required by law, but such notice and proof were afterward lost or destroyed and were not on file in the proper office, *held*, that such loss or destruction does not render the tax sale void.
 4. **TAX DEED; Error as to Amount of Consideration.** Where the county clerk, in executing a tax deed, inserts as the consideration for the deed the amount of the taxes paid by the holder of the tax title and his assignor, without adding any interest or costs, as he should do, and such error is shown by the tax deed itself, and the redemption notice showed "the amount of taxes charged and interest calculated to the last day of redemption," which of course was a larger amount than the amount inserted in the tax deed as the consideration therefor, *held*, that such error of the county clerk with respect to the amount of the consideration for the tax deed does not render the tax deed void.

Error from Saline District Court.

ACTION by Davis against Harrington to have certain tax deeds declared void. Judgment for defendant, January 8, 1885. The plaintiff brings the case here. The opinion states the facts.

John H. Mahan, and W. W. Guthrie, for plaintiff in error.
Garver & Bond, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Leander Davis, in April, 1884, against Patrick Harrington, to have

Opinion of the Court.

certain tax titles set aside and held for naught. It appears from the record, among other things, as follows: The plaintiff through proper conveyances holds the original patent title to the east half of the southwest quarter and the west half of the southeast quarter of section 3, in township 13 south, of range 1 west of the sixth principal meridian, in Saline county, Kansas. The defendant through proper conveyances holds title to the property under two tax deeds, one on the east half of the southwest quarter, and the other on the west half of the southeast quarter of said section of land, both tax deeds having been executed on September 10, 1883, upon tax sales made on September 7, 1880, for taxes levied upon the land for the year 1879, which tax deeds were recorded on September 11, 1883. The defendant is in the possession of the property. The case was tried on December 19, 1884, before the court without a jury, and the court took the case under advisement until January 8, 1885, when it made a general finding in favor of the defendant and against the plaintiff, and rendered judgment accordingly; and to reverse this judgment the plaintiff brings the case to this court.

In this court the plaintiff makes the following points: (1.) The tax deed for the east half of the southwest quarter of said section is void, because it recites that the land was taxable for the year 1879, and was sold in 1879. (2.) The tax deed for the west half of the southeast quarter of said section is void, because it recites that the land was sold at a sale begun and publicly held "at the county seat of said county." (3.) The sale itself was void, because of an unlawful combination among the bidders. (4.) The sale was also void for the reason that there was no record evidence of any notice of the sale on file. (5.) The tax deeds are void for the further reason, that the recitals in each of them show that the amount required for the final redemption of the land from the taxes was a less amount than the final redemption notice to the owner of the land showed the same to be.

By agreement of the parties, the record was so amended as to take the plaintiff's first point out of the case.

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The second point made by the plaintiff is, that the tax deed showed that the land was sold by the county treasurer of Saline county "at the county seat of said county," and did not state or show that the same was sold by him "at public auction at his office." In this respect the tax deeds followed the form given by the statute, and there was not the slightest necessity to deviate from that form in order to make them speak the truth; and hence, in this respect we think the tax deeds were sufficient. (*Hobson v. Dutton*, 9 Kas. 477, 486.) The sale was in fact made at public auction, and at the treasurer's office.

1. Tax deed,
sufficient.

The third point made by the plaintiff is, that there was an unlawful combination among the bidders at the tax sale. Now nearly all the evidence, including the evidence of several witnesses, was against this claim of the plaintiff, and the court below found generally in favor of the defendant and against the plaintiff, and therefore found that there was no such unlawful combination. Several witnesses, including the purchasers of the property in controversy at the tax sale in question, testified positively that there was no combination, nor any agreement or understanding between the bidders that would prevent competition or bidding by any person who desired to bid, and nothing that would render the sale in the least unfair. There was evidence, however, which tended to show that the bidders did not in fact compete with each other for the purchase of the land; and this resulted principally from the fact that no bidder wanted to purchase the land unless he could get the whole of it for the taxes due thereon. Some of the bidders were speculators, some of them were mortgagees who wished to protect their mortgage liens, and others probably bid for other reasons. This case we think comes within the decision in the case of *Beeson v. Johns*, 59 Iowa, 166, 169. In that case the court used the following language:

2. Tax sale,
not void.

"There were three bidders at the tax sale and they did not bid against each other, and this constitutes the only evidence there was of a fraudulent combination. We feel constrained to say this evidence is not, in our opinion, sufficient. Fraud

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cannot be presumed, but the contrary presumption must be indulged in in the absence of evidence. It might well be that each bidder obtained all the land he wanted without the necessity of bidding against anyone else."

The plaintiff also claims that the tax sale was void for the reason that there was no record evidence of any notice of the sale on file. Now the tax deeds themselves are *prima facie* evidence that all things necessary to the validity of the tax deeds were done. And besides, there was ample evidence introduced on the trial to show that such notice was given, that proper proof thereof was made, and that the notice and proof were properly filed as required by law. Afterward, however, such notice and proof were lost or destroyed, and another notice, with proper proof thereof, was substituted therefor. This we think was sufficient. The loss or

3. Loss of notice;
proof.

destruction of the notice and proof first filed does not render the tax sale void, nor the tax deed void; nor does the fact that the notice and proof were at one time lost or destroyed and not on file in the proper office, render any of such tax proceedings void. (*Watkins v. Inge*, 24 Kas. 612, 616.) And further, it will always be presumed, in the absence of anything to the contrary, that public officers do their duty as required by law. (*Young v. Rheinecher*, 25 Kas. 367, 368; *Mix v. The People*, 81 Ill. 118.)

The last objection urged by the plaintiff against the tax deeds is, that their recitals show that the amount required for the final redemption of the land from the taxes was a less amount than the final redemption notice to the owner of the land showed the same to be; or, in other words, the tax deeds show conclusively what the amount required for the final redemption of the land was, and the redemption notice required a larger amount, and therefore required too much. Now we do not think that the tax deeds show any such thing. On the contrary, we think they tend to show the reverse. The tax deeds show the amount of the taxes which the holder of the tax titles and his assignor actually paid upon the land, but they do not show the amount which it would take to redeem the land from

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the taxes at the time when the tax deeds first became due; or in the language of the statute, "the amount of taxes charged, and interest, calculated to the last day of redemption;" but such amount might with some degree of accuracy be calculated from the amounts which the tax deeds show was actually paid by the holder of the tax deeds and his assignor. If the times of such payments were shown by the tax deeds, the amount could be calculated with absolute certainty; but the times of such payments are not shown. The county clerk, however, when he executed the tax deeds, inserted in each tax deed, as the consideration therefor, the aggregate amount of the taxes paid by the purchaser of each eighty-acre tract of land, *without adding any of the costs or interest due thereon*. Of course this aggregate amount of taxes paid, *without* interest or costs, would not be equal to the amount which it would take to redeem the land from the taxes on the last day of redemption, and at the time when the tax deeds became due on the land, which *includes all* taxes, interest, and costs. But this failure

4. Tax deed; error as to amount of consideration.

on the part of the county clerk to state, as the consideration for each of the tax deeds, the amount of the taxes paid, *with* interest and costs, as we think he should do, does not vitiate the tax deeds. This has been expressly decided in the case of *Bowman v. Cockrill*, 6 Kas. 325, where it is held that the filling of the blank (designated in the statutory form as the place for the statement of the consideration of a tax deed) with an amount less than it should be does not render a tax deed void. We presume the redemption notice was absolutely correct. There is no showing to the contrary.

The judgment of the court below will be affirmed.

All the Justices concurring.

M. N. ANDERSON V. HIRAM HIGGINS.

26	201
58	326

ORDERS, Not Reviewable. The denial of a motion by the district court to dismiss an appeal from a justice of the peace, as well as the appointment of a receiver by the district court, are orders which are not reviewable in the supreme court while the action in which they were made is pending in and undisposed of in the district court.

Error from Shawnee District Court.

THE opinion states the case. The defendant brings to this court for review certain orders made by the district court at the January Term, 1885.

J. P. Greer, for plaintiff in error.

H. H. Harris, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: Hiram Higgins sued M. N. Anderson before a justice of the peace, to recover \$300 alleged to be due as rent for the use of a tract of land. He also caused the issuance of an attachment, which was levied upon a crop grown upon the land. A trial was had, which resulted in favor of the defendant. In due time the plaintiff filed an appeal bond, which recited that the plaintiff intended to appeal from the order of the justice discharging the attachment, as well as from the judgment in favor of the defendant. The cause was transmitted to and docketed in the district court, and the defendant there moved to dismiss that part of the appeal which purports to appeal from the order of the justice discharging the attachment, and ordering the attached property to be restored to the defendant. This motion was overruled, and the court, upon application of the plaintiff, appointed a receiver to take possession of and preserve the attached property during the pendency of the suit. The defendant, as plaintiff in error, brings the case here and seeks a reversal of these orders of the district court. The refusal of the court to dismiss the appeal from the justice of the peace is not a final order, nor is it

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one which can be reviewed in this court until the case in which the ruling is made is finally disposed of in the district court. (*Edenfield v. Barnhardt*, 5 Kas. 225; *Brown v. Kimble*, 5 id. 80; *Dolbee v. Hoover*, 8 id. 124; *Potter v. Payne*, 31 id. 218; *Kansas Rolling Mill Co. v. Bovard*, 34 id. 21.)

Neither have we jurisdiction to review the other ruling of the district court which is complained of. The order appointing a receiver is not one which can be brought up to this court and reviewed in advance of the cause in which the order is made. (*Hottenstein v. Conrad*, 5 Kas. 249; *Kansas Rolling Mill Co. v. A. T. & S. F. Rld. Co.*, 31 id. 90.)

The motion of the defendant in error that this proceeding be dismissed from this court must therefore be allowed.

All the Justices concurring.

D. P. HAZELTINE V. DANIEL H. EDMAND.

1. **EAVES-TROUGH, Damage by Water for Want of.** Where two buildings are situated near each other, upon lots adjacent, and the eaves of one come within a few inches of the side or wall of the other, and the owner of such building has no eaves-trough, gutter, or other conductor for carrying off the rain or water falling upon his building, *held*, that an action will lie against him for any damage to the adjoining building, or its contents, caused by the water falling on the roof, and discharged against the wall of such adjoining building, on account of the absence of the proper eaves-trough, gutter, or other conductor to carry off such water.
2. ——— **Misleading Instructions.** Where the defendant, who is the owner of a building, has no eaves-trough, gutter, or other conductor to prevent the water falling and gathering on his roof from being discharged and thrown against and upon the wall of an adjoining building, and the plaintiff, as the owner of such adjoining building, brings an action against the defendant to recover damages for permitting the water falling on the roof of defendant's building to be discharged against and upon the wall of his building; and there is no evidence tending to show that the injuries complained of resulted

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from extraordinary or accidental circumstances, and no evidence tending to show that the defendant had any right, by grant, permission, or prescription, to allow the rain falling upon his building to be discharged from the eaves thereof upon the adjoining building, *held*, that the following portions of the charge given to the jury are misleading, and in a very close case, sufficient ground for reversing the judgment rendered against the plaintiff, namely: "The defendant is liable for all the consequences resulting from such defects or acts, unless the same resulted from extraordinary or accidental circumstances;" and "a party has no right to make any erections on his premises and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, except upon or by express grant or permission, or else by prescription for such length of time as furnishes a presumption of a grant so to do, which is usually for a term of years—twenty years or more for prescription, but if by permission or grant, no particular length of time is required."

Error from Cherokee District Court.

ON JUNE 27, 1882, *D. P. Hazeltine* brought his action against *Daniel H. Edgmand* to recover damages from the defendant for permitting the water falling on the roof of his (defendant's) building to be discharged against and upon the wall and building of plaintiff, and to obtain a restraining order, preventing the defendant from continuing the nuisance. At the commencement of the action, the probate judge of Cherokee county granted a temporary injunction, as prayed for in the petition, and fixed the amount of the undertaking at \$200. On November 29, 1882, the defendant filed his answer, consisting of a general denial only. Trial at the October Term, 1883, before a jury. The court—Chandler, J., presiding—instructed the jury as follows:

"The petition in this case has been read to you, and in substance, so far as is necessary for your consideration, it states: That on the 16th day of May, 1881, and for a long time prior thereto, and at the time of filing the petition, the plaintiff and the owner in fee simple of the following-described real estate, to wit: Seven feet off the east side of lot number fourteen and twenty-five feet off the west side of lot number fifteen, in block number sixteen, in the city of Columbus, Cherokee county, and the buildings and improvements thereon; and that at said

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date the plaintiff had erected on the premises a one-story business house, the east wall of which was wholly built upon the premises of plaintiff, and that the east or outside line of said wall was about one inch west of the east line of said premises, above described, leaving about one inch on the east side of said premises unoccupied; that said east wall of said building is of the length of one hundred and twenty feet, in height twenty-one feet, and in thickness two feet, and constructed of stone and mortar, and that said plaintiff, since the first day of August, 1881, has used and occupied said building for a hardware store, and that on the 16th day of May, 1881, the said defendant, Daniel H. Edgmand, became the owner in fee of the following-described premises: One foot off the east side of lot number fifteen and nineteen feet off the west side of lot number sixteen, all in block number sixteen, in the city of Columbus, in Cherokee county, and the buildings and improvements thereon; that there was at that date and still remained at the time of filing the petition, erected on said premises a large two-story frame building, the west side of which is built near to or upon the west line of said premises last above described, and adjoining the premises of the plaintiff, above described, on the east side, and that the roof on the west side of said building of the defendant is constructed so near to the division line between the premises of the plaintiff and the defendant that the water falling upon or accumulating upon the west side of the roof of the defendant's building is permitted by said defendant to be carried by said roof and deposited in and upon the said east wall of said building of the plaintiff, whereby he, the said plaintiff, has been greatly damaged; that the water so as aforesaid permitted by the defendant to be carried and deposited upon and against the said wall of the said building of plaintiff has permeated said wall and soaked through the same to the inside of the said building, wetting, staining and softening the mortar and plastering in and upon said wall, and thereby loosening the stones in said wall, rendering the same weak and insecure and liable to fall, and staining, rusting and moulding and dampening the goods, wares and merchandise of the plaintiff, placed on the shelves against said east wall, to the nuisance of the plaintiff and to his great and irreparable damage and injury; that said defendant, since the 16th day of May, 1881, has by himself and his tenants occupied said premises so as aforesaid owned by him, and that from said date said defendant, to the time of the filing of said petition, well knew and was fully informed

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of the fact that the water escaping from his said roof was carried and deposited upon and against the said wall of the plaintiff's building, to the plaintiff's great damage and injury, and was a nuisance to the plaintiff; and that the defendant, although often requested by the plaintiff to make such repairs to his said building and provide said building with the necessary gutters and pipes to prevent the water escaping from said roof from being carried and deposited against and upon the wall of plaintiff's building, and thereby doing plaintiff great and irreparable injury and damage, yet the defendant wholly neglected and refused to make such repairs, and that the deposit of water upon and against the said wall of plaintiff from the roof of the defendant's building, with the knowledge and consent of the defendant, is a nuisance to the plaintiff, by reason of which he has sustained great damage and injury in the past, in the sum of one thousand dollars, and its continuance will occasion the plaintiff great and irreparable injury.

"To the averments of the petition, which are in substance as I have directed your attention, the defendant files an answer putting in issue the averments of said petition, and so putting them in issue, the affirmative of this case rests with the plaintiff, and the burden of the proof rests upon him, and he must satisfy you by a preponderance of evidence in this case of the correctness of all the material averments of his petition, and that he has sustained damages in whole or in part as he has therein averred.

"By a preponderance of evidence, I mean that evidence which the court has permitted to go to you in the shape of facts, acts, circumstances and direct evidence surrounding this case, as you have heard it, and then from the witness in this case, which you accept under the rules herein given you, as outweighing or overbalancing the evidence of the defendant, and as sustaining the averments set out in the plaintiff's petition.

"Preponderance of the evidence is not necessarily established by the greater number of witnesses who have testified in this case; it may or may not, as you shall find the facts to be, (if at all,) under the rules herein given you; but it is that evidence, whether it comes from one witness or any number of witnesses, or from facts, acts, circumstances or all developed on the trial of the cause, which you accept as outweighing or overcoming that of the defendant, (if at all,) as sustaining the averments of the plaintiff's petition.

"There are, however, no degrees of preponderance. It may

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be slight or great, if at all; it is enough if it preponderates slightly or in any higher degree of comparison; but it must preponderate in favor of the plaintiff before he can sustain this action. If the plaintiff has offered evidence which tends to sustain the averments of his petition, and the defendant has offered evidence of a like character and weight, so that when weighed by you as jurors, under the rules herein given you, one balances the other, or that of the defendant outweighs that of the plaintiff, then the evidence would not preponderate in favor of the plaintiff, and your verdict must be for the defendant.

"It is admitted on this trial, that at the time of the commencement of this action and prior thereto, the plaintiff was the owner of the premises described in his petition as his. It is admitted also on this trial, that the defendant, on the 16th day of May, 1881, became the possessor and owner of the premises which it is claimed he owns, as averred in the petition, and that he was the owner of the premises on the 16th day of May, 1881, and now is the owner thereof; and plaintiff, for the purpose of establishing the averments of the petition, has given evidence for the purpose of showing that sometime in August, 1882, (and my recollection is about the 10th day of August,) he took possession of the store building which he claims he is the owner of, and from that time up to the time of the commencement of this action, and to the present time, he has been occupying the same as a hardware store; and that on the east wall thereof he has goods of the character described to you, consisting of augers, scissors, knives, forks, spoons, and other property, the character of which you will probably recollect; and that during a portion of that time, and in the months of February, March and April, (and you are to determine that from the evidence, whether my recollection is correct, or not,) the defendant allowed water, which descended in the shape of rain, to escape from the roof off the west side of his building, and allowed it to flow against and strike against the east side of his (plaintiff's) building to his damage, on account of the water damaging the building, and injuring the goods in question.

"The court says to you that a person has the right to do any act upon his own property or land, or make such erections thereon, or have buildings thereon, which does not violate the rights of his neighbor or his property, and to this extent he has full control over his premises in the erection or maintaining of his buildings already erected; he has no right to

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make any erections thereon and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, except upon or by express grant or permission, or else by prescription for such a length of time as furnishes a presumption of a grant so to do, which is usually for a term of years—twenty or more for prescription, but if by permission or grant, no particular length of time is required.

“In this case, the defendant has a right to keep and maintain the building on or near the line of his lot, so long as he keeps the same in the condition that it does not injure the plaintiff by the water or rain falling from the roof thereof on the plaintiff's premises, for which he avers damages in his petition in this action. And if it is so kept and maintained, then the defendant should not be held answerable in this action in damages to the plaintiff; if he does make such use of his property negligently as to damage his neighbor, he does so at his peril and he is liable for injuries naturally resulting from his act.

“While buildings are necessary for business and the habitation of man and essential for all affairs and uses in business, yet the owners of them are called upon to exercise the highest degree of care to prevent their becoming a nuisance to others, and it is the duty of the owner and occupier of a building on a division line to keep gutters or other appliances for the discharge of water from the roof of his building in proper repair and condition, to carry off water that collects thereon, and he is bound to have them of sufficient capacity to carry off the water that may fall in storms likely to occur. And if in this case the defendant, (and whether he did or not is for you to determine,) from any cause that could have been prevented and by the exercise of ordinary care, failed to carry the water from his roof, whereby the building or property of the plaintiff is damaged, as alleged in the petition, the defendant is liable for all the consequences resulting from such defects or acts, unless the same resulted from extraordinary or accidental circumstances.

“If you should find from the evidence in this case, that these buildings are located and situated in the manner concerning which evidence has been given you, and on account of rains falling upon the property of defendant, the water was thrown against the building of plaintiff in this action, and it damaged his goods in the manner claimed by him, then the defendant is answerable for all the injury resulting from the

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rain which fell on the building in that manner, for the reason the plaintiff had the right to occupy his premises free and uninterrupted, and the defendant did not have the right to use his premises to the injury of the plaintiff under such circumstances.

"Evidence has been offered on the part of the defendant for the purpose of showing that his building stands at one end several inches from the building of the plaintiff, and at another end about eighteen inches or more, and that the building which the defendant owned leaned to the east, and on account of its leaning, the water falling from his roof on the eaves thereof could not strike or injure the plaintiff's building or property in the manner claimed by him; but that the water which fell from his (defendant's) roof, fell against his own building, and upon his own property, and not upon or against that of the plaintiff.

"If you should find the water fell on his own ground, or building, and did not injure that of the plaintiff, then of course the plaintiff could not recover in this action under such circumstances, and it is for you to determine what the fact is in this particular, as in all particulars.

"Evidence has also been introduced by the defendant for the purpose of showing the character of the weather, concerning which evidence has been given, and during the time for which the plaintiff claims damages; that a wall of this character would absorb dampness and wet naturally, from natural causes, and that the damage complained of by the plaintiff resulted from that cause.

"If you should find that to be the fact in this case, then the plaintiff cannot recover in this action, for no man can be made liable for injuries resulting purely from natural causes; that is, he would not be liable for the act of God, that is, natural causes which happen from natural laws, or natural events or course of things, and he should not be held to answer because it rained, or because of protracted rain, if the damage complained of was not the act of the defendant in this action, and he did not contribute thereto.

"The principal facts and questions for you to determine are:

"1. Did the water escape from the roof of the defendant's building and damage the property of the plaintiff in this action as claimed by him, in whole or in part?

"2. Did it escape from the roof of the defendant in the manner claimed by plaintiff?

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"3. Did it damage him, the plaintiff, in the manner complained of by him?

"4. Did the water in falling from the roof of the defendant's building fall naturally against the building of the defendant or upon his ground?

"And in addition to that, the further question arises: What damage, if any, has the plaintiff sustained in this action, if you should find water had flowed against his building, as claimed by the plaintiff?

"The rule and measure of damage would be, if you find for the plaintiff, whatever necessarily and directly resulted from the escape of water in the manner claimed by plaintiff, as shown by the evidence, or the direct result of that flow as shown by the evidence in the action which the plaintiff has sustained, if any, unless you should find the plaintiff, by his own negligent act, permitted the property on the shelves, concerning which he has given evidence, with a knowledge of the water flowing, to remain there and become injured, with a full knowledge of the water flowing as claimed by him.

"While the defendant in this action would not be permitted to injure or damage the property of the plaintiff, yet if the plaintiff knowingly and willfully allowed his property to remain against the wall and become injured, he cannot complain of the damage to such property (if any), for the reason it was his duty to exercise ordinary care and diligence in the protection of his property under such circumstances.

"If you should find that water did flow from the roof of defendant's building against the property or the building of the plaintiff, then the law presumes nominal damages resulted on account thereof, and although you may find he sustained no actual damages, yet he would be entitled to what is known in the law as nominal damages for the act, providing it flowed against the building in the manner claimed by the plaintiff, by the wrongful or negligent act of the defendant.

"If you should find the fact to be as claimed by the defendant, that the water fell upon his own premises, then there would be no damages resulting to the plaintiff in this action.

"Concerning the question of damages, the only evidence which has been offered in this trial is the evidence of the plaintiff himself, and he has given you his version of the amount of damages which he claims to have sustained in this action, and you will ascertain the damages, if any, from the evidence in this case.

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"Under the laws of our state, parties to a civil action are made competent witnesses to testify in their own behalf, and as such the plaintiff and defendant have been upon the stand and given their evidence relative to the injury complained of. The fact that they are parties to a suit should in no way militate against them in their evidence or their credibility as witnesses, that is, that fact alone; but the fact that they are parties and the interest which they may have in your verdict, you may take into consideration for the purpose of determining the question as to whether or not they would allow the evidence which they have given to be warped, or whether they would undertake to give evidence untruthfully, or misconstrue or incorrectly give the evidence which they have narrated upon the stand. It is for you to determine whether that is the case or not; and in such evidence they are to be governed by the same rule as other witnesses, to which I shall presently call your attention.

"I say to you that the evidence of the witness C. R. Foster shall not be considered by you in determining the question whether or not the water from the roof of the defendant injured the plaintiff's property, as claimed by him, for the reason that in the case which Mr. Foster gave, the wooden building butted up against the wall.

"Gentlemen of the jury, you are the exclusive judges of the facts established by the evidence in this case, the credibility of the witnesses, and the weight which you will give to the evidence of each of them. It is your right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack thereof, their interest in the prosecution or defense in this action, the relation they bear to each other, their means of knowing the facts concerning which they give evidence, their temper, feeling, or bias, if any has been shown, and from all the surrounding circumstances appearing on this trial, which witnesses you will believe, and which are most worthy of credit in this action, and give credit accordingly; but if the evidence of a witness appears to be fair, is not unreasonable or improbable and is consistent with itself, and the witness has not in any manner been impeached, then you have no right to disregard the evidence of such witness from mere caprice or without cause.

"It is your duty in passing upon the credibility of the several witnesses who have testified in this cause, for the purpose

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of arriving at a proper verdict in this action, to reconcile all the different parts of the testimony, if reasonably possible, giving to each witness credit for what the law presumes — that is, truthfulness concerning the facts about which he or she testifies; but if you cannot do so, then you are to decide for yourselves whom you will believe under the rules herein given you.

“In case you find that a witness has deliberately and intentionally or willfully and corruptly testified falsely as to any material fact in this case, you are at liberty to disregard and reject his or her entire evidence, but you are not obliged to do so, for a witness may be mistaken or testify falsely as to some part of his or her evidence and be truthful and correct as to the remainder thereof, and it is for you to determine, under all the circumstances of the case, how much credit you will give to the evidence of each witness and all witnesses who have testified herein, observing the rules which I have given you. Candidly consider the evidence in this case, free from passion and prejudice, fear or favoritism, and arrive at your verdict from all the evidence submitted to you and the law thereof as you have heard it from the court.

“You will designate one of your number to serve you as foreman, sign your verdict by him as you shall find it, and return it into open court.

“If you find for the plaintiff, your verdict will be: ‘We, the jury, find the issues joined in this action in favor of the plaintiff, and assess his damages at \$——.’

“If you find for the defendant, your verdict will be: ‘We, the jury, find the issues joined in this action in favor of the defendant.’”

The jury returned a verdict in favor of the defendant. The plaintiff filed a motion for a new trial, which was overruled. He also filed a motion that the temporary injunction heretofore granted be made permanent. This was also overruled. Judgment was thereupon rendered for the defendant. The plaintiff excepted to the various rulings of the court and to the rendition of judgment against him, and brings the case here.

Ritter & Skidmore, and *W. R. Cowley*, for plaintiff in error.
M. M. Edmiston, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: In the spring and summer of 1881, D. P. Hazeltime constructed a stone building, with a brick front and tin roof, upon his premises, in the city of Columbus, the side walls of which, from the top to the foundation, were about twenty-one feet; the length of the building one hundred and twenty feet; the foundation about three feet deep in the earth; and the walls above the foundation two feet thick; the east wall of the building being located one inch west of the east line of his lot. In August, 1881, Hazeltime moved into his building, and opened up a hardware store. He had shelves on the inside of his east wall, where he kept spoons, scissors, knives, locks, screws, hinges, etc. In April or May, 1881, Daniel Edgmand purchased the Commercial House, a two-story frame building, about twenty feet wide, with a main part about sixty feet long, and a kitchen extending back. This building was situated upon a lot adjoining and east of Hazeltime's premises. The building had a shingle roof, sloping east and west from the center, about one-third pitch. On the west side the roof had no eaves-trough, gutter, or other conductor for catching and carrying off the rain or water falling upon the building. At the south end, near the ground, the walls of the buildings were from five to seven inches apart. Upon the ground, at the north end, they were from twenty to thirty inches apart. The wooden building leaned to the east, and the space between the buildings gradually widened from the south to the north end, and from the ground up, so that the space between the walls of the buildings, at the top, ran from ten to thirty-three inches. The roof of the wooden building was about two feet below the top wall of the stone building. The eaves of the wooden building projected beyond the face of the walls. In the petition, it is alleged that the rain and water falling upon the roof of the wooden building was discharged and thrown against and upon the east wall of the stone building; that the rain and water penetrated through the wall and plastering, staining the wall and crack-

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ing the plastering, whereby the shelf hardware in the stone building became damp and rusty.

Upon the trial the court, over the objection of plaintiff below, charged the jury as follows:

"While buildings are necessary for business and the habitation of man, and essential for all affairs and uses in business, yet the owners of them are called upon to exercise the highest degree of care to prevent their becoming a nuisance to others, and it is the duty of the owner and occupier of a building on a division line to keep gutters, or other appliances for the discharge of water from the roof of his building in proper repair and condition to carry off the water that collects thereon, and he is bound to have them of sufficient capacity to carry off the water that may fall in storms likely to occur. And if, in this case, the defendant, (and whether he did or not is for you to determine,) from any cause that could have been prevented, and by the exercise of ordinary care, failed to carry the water from his roof, whereby the building or property of the plaintiff was damaged, as alleged in the petition, the defendant is liable for all the consequences resulting from such defects or acts, *unless the same resulted from extraordinary or accidental circumstances.*"

This instruction is unfortunate in the language employed, and was very liable to mislead the jury. All the evidence shows that the defendant below had no gutters or other appliances to catch and carry off the rain or water falling on his west roof. Therefore it is clear that he did not exercise any care to prevent the water falling upon his own roof from being discharged upon the wall of plaintiff. No principle is more firmly established than that contained in the familiar maxim, "*Sic utere tuo ut alienum non lædas;*" and if the water from the defendant's roof fell upon plaintiff's building

on account of the neglect of defendant to have a
 1. Damage for want of eaves-trough.
 trough or gutter, or some other conductor, to the injury of plaintiff's wall and hardware, the defendant is liable. Then again, there was no evidence in the case tending to show that any water or rain was discharged upon plaintiff's building from extraordinary or accidental circumstances. Extraordinary and accidental circumstances are

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sometimes construed to mean something in opposition to the act of man, as storms. In any event, the law would require the defendant to have troughs or gutters of sufficient capacity to prevent the rain or water falling upon his building in all storms likely to occur, from being discharged upon plaintiff's building. (*Bellows v. Sackett*, 15 Barb. 96; *Wood on Nuisances*, §118.) In addition to there being no evidence tending to show the circumstances referred to in the charge, without further explanation the jury would be very liable to misunderstand and misconceive the purport of the words "extraordinary or accidental." The paragraph commencing "And if in this case," etc., should have been omitted.

2. Misleading instructions.

Again, in another part of the charge, the following language was used:

"The court says to you, that a person has the right to do any act upon his own property or land, or make such erections thereon, or have buildings thereon, which do not violate the rights of his neighbor or his property; and to this extent he has full control over his premises in the erection or maintaining of his buildings already erected. He has no right to make any erections thereon and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, *except upon or by express grant or permission, or else by prescription for such a length of time as furnishes a presumption of a grant so to do, which is usually for a term of years—twenty years or more for prescription, but if by permission or grant, no particular length of time is required.*"

There was no evidence tending in any way to show that the defendant had the right to let the water falling on the roof of his building be discharged upon or against the plaintiff's building by grant, permission, or prescription. All of the exceptions stated should have been left out of the charge, as they were liable to mislead and confuse the jury.

As far as possible, instructions should be applicable to the evidence presented upon the trial, and we think, considering the verdict in this case, that the jury were probably misled by

portions of the charge which were not supported by the evidence, and in this case were wholly irrelevant. The evidence is very conflicting and contradictory as to whether the water from the defendant's roof actually fell upon the wall or building of the plaintiff, and therefore the mischief is the greater from the instructions given upon matters not in evidence. (*Savings Association v. Hunt*, 17 Kas. 532; *Raper v. Blair*, 24 id. 374; *Railway Co. v. Peavey*, 29 id. 169; *Feineman v. Sachs*, 33 id. 621; *Railway Co. v. Fray*, 31 id. 739.)

The judgment will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

THOMAS C. RITTER, *et al.*, v. JOHN W. HOFFMAN.

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1. **PENNSYLVANIA JUDGMENT, *When Enforced in Kansas.*** Under the laws of Pennsylvania, as they are shown to be by the parol and statutory evidence introduced on the trial, a valid personal judgment may be rendered in the state of Pennsylvania by the clerk of the court, or prothonotary, in vacation, upon a penal bond and a written confession of judgment, for the full amount of the penalty, without summons or pleadings, but merely upon the request of the obligee of the bond; and such judgment will be enforced in Kansas to the extent of the actual damages suffered by the obligee.
2. **JUDGMENT, *Confessed in Pennsylvania.*** Under the evidence in the case, an instrument in writing confessing judgment, executed in Pennsylvania and by a resident of that state, gives to the courts of Pennsylvania such jurisdiction over the person of the defendant that a valid personal judgment, enforceable in another state, may be rendered against him merely upon his written confession and the request of the holder of the instrument; and this without summons or pleadings or appearance by the defendant, and by the clerk of the court, or prothonotary, in vacation, and although the defendant may at the time of the rendition of the judgment be absent from the state of Pennsylvania and a resident of another state.
3. **FOREIGN JUDGMENT—*When Enforcible, When Not.*** A judgment rendered and entered in a state other than Kansas in accordance with

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the laws of such other state and valid there, may be valid and enforceable in Kansas, although a judgment rendered and entered in the same manner and form and under like circumstances in Kansas, would be utterly void.

Error from Saline District Court.

IN August or September, 1883, *John W. Hoffman* commenced an action in the district court of Saline county, against *Thomas C. Ritter* and *Abraham Ritter*, to recover the sum of \$300 with interest and costs. On November 14, 1883, the plaintiff, with leave of the court, filed an amended petition, which reads as follows, omitting title and signature:

"The said plaintiff complains of said defendants, and says that at the times hereinafter mentioned, the court of common pleas in and for the county of Columbia and state of Pennsylvania, was a court of general jurisdiction, duly created and organized under the laws of that state; that on, to wit, May 29, 1879, the said plaintiff, by the consideration of said court, recovered a judgment against said defendants for the sum of three hundred dollars, which said judgment was duly given and entered, and still remains in said court in full force and effect, in no wise reversed or annulled. A copy of said judgment is hereto attached, marked 'Exhibit A,' and made a part of this amended petition.

"Said plaintiff further says that said judgment was entered upon a certain indemnifying bond executed by said defendants to said plaintiff, a copy of which is hereto attached, marked 'Exhibit B,' and made part hereof; for the purposes in said bond mentioned—that thereby said defendants bound themselves to indemnify and save harmless the said plaintiff from all suits, actions, damages and costs that he might suffer, or that might accrue to him by reason of his proceedings under certain executions issued at the suit of said defendant, T. C. Ritter, against Barney Weiss and L. Weiss; that after the execution of said bond, and by virtue of said executions, said plaintiff was held liable by reason of his proceedings thereunder, to one Hannah Weiss, who claimed to be the owner of the property levied on and mentioned in said indemnifying bond, and in an action duly commenced in said court of common pleas of Columbia county, Pennsylvania, on, to wit, April 22, 1878, by said Hannah Weiss against this plaintiff, said Hannah Weiss, by the consideration of said court, duly

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recovered a judgment against plaintiff for the sum of \$168, and \$82.40 costs of suit, which said judgment was entered in said court on, to wit, May 16, 1879, and was thereafter paid by plaintiff; that said sum of \$168 and costs of \$82.40 were the damages and costs against which said indemnifying bond was given. Said plaintiff says that said defendants have neglected and refused to reimburse him for said damages and costs, or to pay any part of said judgment for \$300 entered against them on said bond, and the same remains wholly unsatisfied.

"Wherefore, said plaintiff prays judgment against said defendants for the sum of \$250.40, with interest thereon from May 16, 1879."

"Exhibit A," above mentioned, reads as follows:

STATE OF PENNSYLVANIA, COUNTY OF COLUMBIA, SS.
—Among the records and proceedings of the court of common pleas in and for said county, *inter alia*, it is thus contained:

APPEARANCE DOCKET ENTRY TO SEPTEMBER TERM, 1879.—No. 41.—*John W. Hoffman* (41) *v. Thomas C. Ritter and Abraham Ritter*.—\$125 paid by plff. Judgment confessed on indemnifying bond for \$300. Dated June 7, 1877. Conditioned to indemnify and save harmless the above-named John W. Hoffman, sheriff, in a certain writ of *feri facias*, against Barney Weiss and L. Weiss at the suit of Thomas C. Ritter, waiving exemption, inquisition, condemnation, and stay of execution. May 28, 1879, judg't is entered. Wm. KRICKEBAUM, *Prot.*

JUDGMENT DOCKET ENTRY.

DEFENDANTS.	PLAINTIFF.	No.	TERM	YEAR	DATE OF LIEU.	NATURE.	AMOUNT.
Ritter, Thomas C., et al.,	John W. Hoffman..	41	Sept.	1879	28 May, 1879.	Indemnify'g b'd..	\$300 00
Ritter, Abraham, et al.,	Same.....	41	Sept.	1879	28 May, 1879.	Indemnify'g b'd..	300 00

"Exhibit B," mentioned in the petition, is an indemnity bond in the penal sum of \$300, and such as is described in the petition and in "Exhibit A;" and it also contains the following stipulation, to wit:

"And we (Thomas C. Ritter and Abraham Ritter) do hereby confess judgment for the above-named sum, without stay of execution, waiving the three hundred dollars exemption law, waiving inquisition, with confession of condemnation on real estate."

The amended answer of the defendants is as follows, omitting title and signature:

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"And the said Thomas C. Ritter and Abraham Ritter, defendants, now come, and for their amended answer to the petition of the said John W. Hoffman, plaintiff, allege and say:

"1. That they deny each and every allegation and averment in said petition contained.

"2. And for a second and further cause of defense to said petition, said defendants say that at the time when said proceedings were commenced as set forth in plaintiff's petition, and at the time when said supposed judgment was rendered as alleged in said petition, they, the said defendants, were citizens of the state of Kansas and were residing therein; and said defendants further allege that they were not served with process in said case, and had no notice whatever of the pendency of said action, and that they never appeared thereto in person nor by attorney, and this they are ready to verify.

"3. And for further cause of defense defendants allege and aver that said prothonotary of said court of common pleas had no jurisdiction or authority in law to enter said pretended judgment.

"4. And for a fourth cause of defense defendants allege and aver that said court of common pleas had no authority in law to render said pretended judgment.

"5. Said defendants further allege and aver that said pretended judgment is void in law. Wherefore, defendants pray judgment for costs."

The reply of the plaintiff to this answer was a general denial. The case was tried before the court, without a jury, on December 22, 1884, and the court found generally in favor of the plaintiff and against the defendants, and rendered judgment accordingly in favor of the plaintiff and against the defendants for \$348.50. The defendants bring the case to this court.

R. A. Lovitt, for plaintiffs in error.

Garver & Bond, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: In the year 1877, John W. Hoffman, who was the sheriff of Columbia county, Pennsylvania, held in his hands a writ of *fiery facias*, or in other words, an execution, in favor of Thomas C. Ritter, and against Barney Weiss and

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L. Weiss, under which execution he, the sheriff, levied upon certain property as the property of the defendants in the execution. Hannah Weiss claimed the property, and there being an uncertainty as to whom it belonged, Ritter and his father, Abraham Ritter, gave to the sheriff, Hoffman, an indemnity bond, with a confession of judgment for \$300. This bond and confession were executed June 7, 1877. At that time the Ritters resided in Columbia county, Pennsylvania. Afterward, and sometime in February, 1878, they removed to Saline county, Kansas, where they have resided ever since, and have not been in Pennsylvania since their removal to Kansas. The property levied on was sold by the sheriff, and the proceeds applied in partial satisfaction of the execution. The property, however, did not in fact belong to Barney Weiss and L. Weiss, or to either of them, but belonged to Hannah Weiss; and on April 22, 1878, she commenced an action against the sheriff, and recovered a judgment against him, for the value thereof, \$168 and costs of suit, \$82.40, which judgment Hoffman paid. This judgment was rendered on May 16, 1879. Afterward, and on May 28, 1879, Hoffman, the sheriff, procured a judgment to be rendered in the court of common pleas of Columbia county, Pennsylvania, in his favor and against Thomas C. Ritter and Abraham Ritter on the indemnity bond, for \$300. Afterward, and sometime in August or September, 1883, Hoffman commenced this present action in Saline county, Kansas, which involves in its determination the legal effect of the foregoing facts. Judgment was rendered in this action in favor of the plaintiff, Hoffman, and against the Ritters, on December 22, 1884, for \$348.50 and costs of suit; and on February 25, 1885, the defendants brought the case to this court for review.

The plaintiffs in error, defendants below, claim that the judgment rendered against them and in favor of Hoffman in the common pleas court of Columbia county, Pennsylvania, on the indemnity bond and confession of judgment, is an absolute nullity, for several reasons, which we shall hereafter mention; and further claim that upon the other facts of the

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case Hoffman is not entitled to any relief, for the reason that they do not constitute a cause of action; that the court erred in overruling the defendants' demurrer to the plaintiff's petition and in permitting the plaintiff to amend his petition, and in overruling the defendants' motion for a new trial. On the other hand, the defendant in error, plaintiff below, claims that the judgment rendered in Pennsylvania on the indemnity bond and confession of judgment is valid, but even if not, still that upon the other facts alleged in his amended petition he is entitled to recover, and that the court below did not err in any of the respects claimed by the defendants, plaintiffs in error. A judgment rendered in Kansas in the manner and form in which the Pennsylvania judgment was rendered would be an utter nullity in Kansas; but according to the evidence introduced on the trial in this case such is not the case in Pennsylvania. According to the evidence introduced on the trial of this case, the judgment rendered in Pennsylvania is absolutely good and valid in the state of Pennsylvania; and, according to the decisions rendered in Pennsylvania, we would also think that the judgment is absolutely good and valid. A valid judgment may be rendered in Pennsylvania upon a confession, as this was, without summons or pleadings, and by the clerk of the court in vacation, or by the prothonotary, as the clerk is called in Pennsylvania. It may be rendered merely upon the personal appearance and confession of the defendant himself, or upon the appearance and confession for the defendant by an attorney at law, duly authorized in writing to do so by the defendant, or upon a confession contained in a written instrument executed by the defendant, without any appearance by the defendant himself or any person for him, but merely at the request of the holder of such instrument; and the judgment thus rendered may be upon a debt due, or for an agreed amount to secure a future or contingent liability, or unascertained and unliquidated damages. Among the numerous decisions rendered in the state of Pennsylvania concerning these matters we would cite the following: *Holden*

1. Pennsylvania judgment, when enforced in Kansas.

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v. Bull, 1 Pen. & W. 460; *Miller v. Howry*, 3 id. 374; *Stewart v. Stocker*, 1 Watts, 135; *Pennock v. Copeland*, 1 Phil. 29; *Moore v. Hutchinson*, 1 id. 377; *McCalmont v. Peters*, 13 Serg. & R. 196; *Cook v. Gilbert*, 8 id. 567; *Ely v. Karmany*, 23 Pa. St. 314; *McClure v. Roman*, 52 id. 458; *Shenk's Appeal*, 33 id. 371; *Parmentier v. Gillespie*, 9 id. 86; *Terhoven v. Kerns*, 2 id. 96; *Sheble v. Cummins*, 1 Brown, 253.

We think the only question for us to determine in this case is, whether the judgment rendered in Pennsylvania is equally as good in Kansas as it is in Pennsylvania. If it was rendered without jurisdiction personally of the defendants, of course it would be void in Kansas; but if it was rendered with such jurisdiction, then it would be equally as good and valid in Kansas as it is in Pennsylvania; for, under § 1, article 4, of the federal constitution, "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." The defendants claim that the judgment is void in Kansas for the following reasons:

"The record made by the prothonotary is designated 'judgment docket entry.' It is entered as at the September term, 1879. No summons was ever issued and no appearance was ever made by either of the defendants. No judgment was ever rendered by the court itself. No finding was ever made by the court as to the amount due Hoffman, if anything, on said bond. The action of the prothonotary was never ratified and confirmed by the court at or during the subsequent September term. As far as appears from the record, and as far as the Pennsylvania law is concerned, upon which defendant in error relies, he was at liberty to take judgment on said bond the next day after it was executed, and it would have been just as valid in our courts as the one sued on. . . . It does not appear from the face of the instrument the amount that is due; in fact it does not appear from the instrument that any amount was due at the time it was filed by the prothonotary."

The defendants further claim that the judgment is void in Kansas for the reason that it was rendered for the amount of a penal bond given to secure a future and contingent liability, and to secure at most only unascertained and unliquidated damages which had not yet accrued; also for the reason that

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these damages were not proved at the time when the judgment was rendered; and also for the reason that the defendants were in Kansas and not in the state of Pennsylvania at the time when the judgment was rendered. The question, however, as to how far these matters may affect the validity of the judgment in Pennsylvania, or as to whether they can have the effect to render the judgment invalid in Pennsylvania, has been completely answered by the evidence introduced on the trial of this case. The judgment was shown by the evidence, parol and statutory, to be valid in Pennsylvania; and while it seems that judgments may sometimes be rendered in Pennsylvania before the ultimate liability of the defendant occurs, and for more than the amount of that liability, yet the courts of Pennsylvania seem to be ever watchful that no injustice shall be done. It seems that the courts there hold that whatever in equity and good conscience ought to be a satisfaction of such judgments will in fact be a satisfaction thereof; and therefore, whenever a judgment is rendered on a penal bond, as in this case, for the full amount of the penalty, the plaintiff holds the judgment, in effect, only as a security, and may collect on the judgment only his real and actual damages. At common law, as contradistinguished from equity, judgments were rendered on penal bonds for the full amount of the penalty. (2 Blackstone's Com. 341; 1 Tidd's Pr. 585.) And in this very case the district court of Saline county, Kansas, rendered judgment only for the plaintiff's real and actual damages, including interest, and not for the full amount of the penalty of the bond, with interest, nor for the full amount of the Pennsylvania judgment, with interest. Is the Pennsylvania judgment valid to this extent in Kansas? This question depends solely, as we think, upon the further question whether the court of Columbia county, Pennsylvania, which rendered the judgment, had at the time sufficient jurisdiction of the persons of the defendants to render the judgment. In several of the states, judgment may be rendered in vacation by the clerks of the courts, or by the prothonotaries, as they are called in Pennsylvania, and in several of the states judgments may be rendered upon

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instruments in writing, executed by the defendants as this was, confessing judgment; and in Pennsylvania, and perhaps in some of the other states, and at common law, judgments may be rendered on penal bonds for the full amount of the penalty. All this is shown to have been regularly and properly done, under the laws of Pennsylvania, in the present case. Under the laws of Pennsylvania, as shown by the evi-

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confessed in
Pennsylvania;
practice.

dence, parol and statutory, we think the Pennsylvania court rendering the judgment in the present case had jurisdiction of the persons of the defend-

ants. It is not necessary in all cases that a summons should be issued and served upon a party to the action in order to give the court jurisdiction over him personally. A summons is never issued against a plaintiff, and still the court has the same jurisdiction of the plaintiff that it has of the defendant. A voluntary appearance in the court is all that is required of either the plaintiff or the defendant. Neither is it necessary that the appearance of the party should be in person. It may be by attorney. In many cases neither the plaintiffs nor the defendants ever appear personally in the court, and yet the court may have ample jurisdiction of both. A plaintiff, by the voluntary appearance of his authorized counsel, may give such personal jurisdiction of his person to the court that a personal judgment rendered against him would be valid everywhere in the United States, although he had never in fact made any personal appearance in the court, nor even been in the state where such court was held, or such judgment rendered. He has given such jurisdiction by simply authorizing an attorney to appear for him, and by the appearance of such attorney in the case. In the present case, while the defendants were residents of the state of Pennsylvania they executed an instrument in writing, which under the laws of Pennsylvania gave any proper court authority to take such jurisdiction of their persons as to render a valid personal judgment against them; and by leaving the state of Pennsylvania without attempting to revoke or cancel that instrument, we do not think that they so revoked the power of the courts of Pennsylvania that they could not

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afterward take jurisdiction of the defendants' persons, and render a valid personal judgment against them. And here we might say, that when the defendants executed the instrument in writing, confessing judgment, and upon which the Pennsylvania judgment was rendered, they were bound to know what the laws of Pennsylvania were, and such laws became a part of their contract, and by their contract they surrendered jurisdiction of themselves personally to the courts of Pennsylvania. A Pennsylvania judgment similar to the one in question in this case, has been held to be valid in Iowa. (*Crafts v. Clark*, 38 Iowa, 237; see also *Patterson v. The State*, 2 G. Greene, 493.) About the only differences between the Pennsylvania judgment held to be valid in Iowa and the one now in question, are that the Pennsylvania judgment held to be valid in Iowa was rendered upon the authority given in writing to *any attorney of any court of record in Pennsylvania to enter judgment*, and was rendered upon a *promissory note nearly five years before it was due*, and there is nothing to show *where the defendants were at the time*, whether in Pennsylvania or elsewhere; while the judgment in question in this case was rendered upon a *written confession of judgment* by the defendants themselves, upon a penal bond, *after condition broken*, and the defendants at the time the judgment was rendered *were in Kansas*, and resided in Kansas. These differences are certainly not sufficient to authorize a holding that the judgment in question in this case is invalid, if it was rightly held that the judgment in question in the Iowa case was valid. We think, under the facts of this case, the Pennsylvania judgment must be held to be valid; and we further think that even if it were invalid, still that the facts alleged in the plaintiff's amended petition constitute a good cause of action, and authorize the judgment that was in fact rendered by the court below.

Whether the court below erred in overruling the defendants' demurrer to the plaintiff's original petition is wholly immaterial, for the plaintiff subsequently filed an amended petition which we think states a good cause of action. And we do not

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think that the court below erred in overruling the defendants' motion for a new trial. Indeed, we do not think that the court below committed any material error.

The judgment of the court below will be affirmed.

All the Justices concurring.

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B. F. SIMPSON, *et al.*, v. D. P. ALEXANDER.

1. **CONVERSION; Measure of Damages.** In an action to recover damages for the seizure and conversion of a stock of merchandise, the plaintiff is entitled to recover the value of the property at the time of conversion, with interest thereafter at the rate of seven per cent. (*Shepard v. Pratt*, 16 Kas. 209.)
2. ——— Evidence examined, and held to be sufficient to sustain the verdict.

Error from Shawnee District Court.

ACTION by *Alexander* against *Simpson* and another, to recover damages for the seizure and conversion of a stock of merchandise of which plaintiff claimed to be the owner. Trial at the January Term, 1884, and judgment for plaintiff for \$2,650. The defendants bring the case to this court. The material facts appear in the opinion.

W. C. Webb, and *Waters & Ensminger*, for plaintiffs in error.

Stanley & Wall, and *J. B. Johnson*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: D. P. Alexander brought this action against the plaintiffs in error to recover damages for the seizure and conversion of a stock of merchandise of which he claimed to be the owner. The seizure was made by B. F. Simpson, as United States marshal, and John H. Smith, as deputy marshal, under and by virtue of a writ of attachment issued out

Simpson v. Alexander.

of the United States circuit court, in an action by Charles R. Lewis against the Alexander Brothers, a firm composed of the three sons of D. P. Alexander, and the stock was levied on as the property of the firm. The controversy in this case was in regard to the ownership of the goods. The jury found in favor of D. P. Alexander, and awarded him damages in the sum of \$2,650. A new trial was asked and denied, and the principal ground relied upon was that the findings and verdict of the jury were not sustained by the evidence. The testimony is voluminous and somewhat conflicting. A review of it here could be of no profit, but we have read it with care, and have no hesitation in saying that it sufficiently supports the verdict rendered. It is true that the testimony of two of the witnesses tended to show that the Alexander Bros. may have had an interest in the stock of merchandise; but against one of these there was considerable impeaching testimony offered, and both were contradicted by four or five other witnesses, who appear to be at least equally credible. But it is not our province to judge of the weight of the testimony, nor to settle upon which side the preponderance was. There was testimony which fully justified the verdict, and the district court and jury having passed upon the question of ownership, and determined it in favor of the plaintiff below, it has passed beyond our province to interfere, or to disturb the result which they have reached.

What has been said respecting the general verdict applies to the complaint made that the answers to certain special questions are not supported by the testimony. In response to the question of what was the value of the goods taken from the store of the Alexander Bros., in Wichita, to the store of the defendant in error, at Wellington, the answer was, \$1,100. The testimony placed the value at from \$1,100 to \$1,460, and although it seems to us that the preponderance of testimony showed that the goods thus transferred were worth more than \$1,100, yet there was some testimony upon which to found the answer. But, if it is granted that the jury were mistaken, it would not warrant us in disturbing the verdict. The in-

2. Evidence supports verdict.

Opinion of the Court.

quiry with respect to this transaction was concerning the good faith and honesty of the parties, and the value of the goods transferred was not of great importance. In effect the jury have found that the transfer was honestly made, and therefore an error of the jury in fixing the value of the goods transferred, if such there was, does not affect the general verdict.

Error is also assigned upon the ruling of the court that interest might be allowed as an element of damages. The instruction of the court was :

“If you find for the plaintiff, the measure of his damages will be the value of the goods at the time they were taken by the defendants at the place they were so taken, with seven per cent. interest on such amount from the time of conversion.”

We see no objection to this ruling. The theory of the law is that the party whose property has been taken and converted shall receive full indemnity for the loss. He has been wrongfully deprived of the use of his property, and certainly the one who takes and appropriates it ought not to reap any benefit by reason of his wrong-doing. In this case, the business of the plaintiff below was interrupted, and for years he has been kept out of the possession of a large stock of merchandise and from the use of the money arising from its sale, and the mere value of the property when it was taken and converted would be wholly inadequate to repair his loss. So it has been

Conversion;
measure of
damages.

said in cases of this kind, that the owner is entitled to recover the value of the property at the time of conversion, with interest thereon to the date of the verdict. (*Shepard v. Pratt*, 16 Kas. 209; *Andrews v. Durant*, 18 N. Y. 496; *Chapman v. C. & N. W. Rly. Co.*, 26 Wis. 295; *McCormick v. Pennsylvania Central Rld. Co.*, 49 N. Y. 303; *Hamer v. Hathaway*, 33 Cal. 117; 1 Sutherland on Damages, 174.)

In our opinion the judgment of the district court should be affirmed.

All the Justices concurring.

LORENZO F. BIRD V. ISAAC LOGAN, *et al.*

1. **HOMESTEAD; Conveyance Without Joint Consent.** Where a husband and wife execute a bond for a conveyance of their homestead, and they are ignorant and illiterate and can have no knowledge of the contents of the bond except as they are informed by others, and they execute the bond at different times, and the wife executes the bond after the husband has executed the same, and without any consultation with him or knowledge of its contents or its nature or character, or of any of the transactions connected therewith, except as she is informed by a notary public, acting as the agent of the obligee, and she executes the bond under a misapprehension as to the consideration for it, and as to the amount of a lien held by the obligee upon the real estate to be conveyed, which lien he is to remove, and these misapprehensions are brought about and induced by the agent of the obligee; and the consideration for the real estate agreed to be conveyed is inadequate: *Held*, Assuming that the husband was properly informed concerning all these matters, that there was no sufficient "joint consent" on the part of the husband and wife to the alienation of their homestead, and no sufficient equitable grounds for the specific enforcement of their contract, as will authorize an action in equity on the part of the obligee against the obligors for the specific enforcement of the contract; and further *held*, that the action cannot be maintained, whether the husband was properly informed, or not.
2. **CONTRACT; Specific Performance—When Enforced, When Not.** A contract will be specifically enforced only where its specific enforcement is equitable; and generally, only where the plaintiff has in equity and good conscience a right to demand its specific enforcement; and generally, where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced.

Error from Atchison District Court.

IN this case the court below made the following findings and conclusions, to wit:

CONCLUSIONS OF FACT.

"1. On and prior to February 20, 1882, the defendants were, and ever since said time they have been, husband and wife, and occupying as their homestead lot 12, block 23, North Atchison, consisting of less than one acre in the incorporated city of Atchison, in Atchison county, Kansas, the legal title of which homestead was and is in said Isaac Logan.

Statement of the Case.

"2. On February 20, 1882, said defendants executed and delivered to the plaintiff a mortgage on said real estate to secure the payment of the sum of \$176, with interest at 12 per cent. per annum from said date, of which \$100 thereof was for purchase-money of said real estate and lumber for improvements thereon.

"3. On November 28, 1882, the plaintiff and said Isaac Logan agreed upon a sale of said premises to the plaintiff for the sum of \$350, from which the mortgage indebtedness was to be deducted. The plaintiff then drew up the bond for a deed, a copy of which is annexed to the petition herein; and both of the defendants being illiterate and unable to write their names, the plaintiff wrote their names at the bottom of said instrument and also the words 'His mark' and 'Her mark,' and also made the two marks by cross. Said Isaac Logan then touched the pen to his mark, and the plaintiff paid him the sum of \$30, and told him that there would be just \$100 remaining to be paid, and that he would pay that sum when the deed was executed by both of the defendants. Said Anna Logan was not present at any of said negotiations, and she had no knowledge of them on that day nor of the payment of said sum of \$30.

"4. On November 29, 1882, at the request of the plaintiff and Isaac Logan, J. P. Adams, a notary public, went to the house of the defendant to obtain the signature and acknowledgment of said Anna Logan to said instrument, he having previously taken the acknowledgment of said Isaac Logan thereto. Said Isaac Logan was not at home, but his wife was found there alone. Said Isaac Logan had not told her about the negotiations and transactions with the plaintiff, but she knew of the existence of said mortgage. She and her said husband had had some trouble, and they were not on good terms, although they continued to live together. She at first refused to sign the instrument, or to have anything to do with it, and said that it was the distinct understanding between herself and her husband when she signed the mortgage, that it was the last instrument she would ever sign relating to the property. Said J. P. Adams told her that she had a right to sign it, or not, as she chose; that the plaintiff's claim upon the property was \$250, and that said Isaac Logan might be able to pay it off, in which case it could not be sold. From the statement in the instrument and some knowledge that said J. P. Adams had about said mortgage, he supposed that the plaintiff's claim upon the property was \$250, when in fact it

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was only \$192.31, including interest to the date of said instrument; and said Anna Logan believed the representations made by said J. P. Adams. At length she concluded that said Isaac Logan would fail to pay the \$250, and that the mortgage would be foreclosed, and she then proposed that if she could have the remaining \$100 paid to her she would sign the instrument, and said J. P. Adams told her that he would see the plaintiff about it, and that he supposed it could be so arranged that she would get the \$100. She then touched the pen to said mark, and said J. P. Adams left; and he made out the certificate of acknowledgment, a copy of which is appended to the copy of said instrument annexed to the petition herein. She knew nothing about the terms of the contract between the plaintiff and said Isaac Logan, nor of the real amount of the indebtedness, except as she was then told by said J. P. Adams. Said J. P. Adams stated to the plaintiff that said Anna Logan had signed the instrument and agreed to make the deed, only on condition that the \$100 should be paid to her, and the plaintiff said that would be all right. On said 29th day of November, 1882, after the return of said acknowledged instrument to the plaintiff, he duly entered satisfaction of said mortgage upon the record thereof.

"5. On or about January 1, 1883, the plaintiff made a tender of \$100, lawful money of the United States, to said Isaac Logan, and demanded a deed for said real estate, but said Isaac Logan refused to accept the money, and refused to make a deed, on the ground that his wife would not join in it. On the next day the plaintiff sent for said Anna Logan, and she went to his office, and he then and there tendered her the sum of \$100, lawful money of the United States, and demanded a deed for said real estate; but said Anna Logan refused to accept the money, and refused to make a deed unless the plaintiff would pay her \$200, which the plaintiff refused to do. On April 7, 1883, the plaintiff again tendered to both of the defendants, at different places, said sum of \$100, lawful money of the United States, and also tendered to each of them, at different places, a blank deed, properly filled out, for said real estate, and requested the defendants to sign and execute the same; but the defendants each refused to accept said sum of money, and refused to sign and execute said deed for said real estate. Neither of said defendants has ever returned to the plaintiff said sum of \$30, nor any part thereof, nor paid said mortgage debt, nor any part thereof.

"6. On November 28 and 29, 1882, real estate in that part

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of the city of Atchison was of dull sale, but the market value of the real estate in controversy was \$400 to \$450, and its value at the present time, no additional improvements having been made, is about \$700."

CONCLUSIONS OF LAW.

"1. There was no such joint consent of husband and wife to the alienation of said homestead as should be enforced in equity.

"2. Said Anna Logan having been influenced to execute said instrument by a materially erroneous statement of the condition of the property by the officer who was the plaintiff's agent, the contract should not be specifically enforced against her.

"3. The facts stated do not entitle the plaintiff to specific performance.

"4. Each party ought to pay his and her own costs herein."

Judgment accordingly for defendants, at the June Term, 1884. The plaintiff brings the case here.

Jackson & Royse, for plaintiff in error.

Smith & Solomon, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This action, as it was tried in the court below, was an action to compel the specific performance of an alleged contract for the sale and purchase of real estate. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and rendered judgment upon such findings and conclusions in favor of the defendants and against the plaintiff; and the plaintiff, as plaintiff in error, brings the case to this court for review.

The plaintiff challenges the correctness of both the findings of fact and the conclusions of law, but we are inclined to think that both are correct, and that the final judgment rendered thereon is also correct. It is admitted that the defendants were and are husband and wife, and that the property in controversy was and is their homestead; therefore any alienation of this property, or any contract for the alienation thereof, to be of any validity requires that the "joint consent" of both

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the husband and wife should be given thereto; and this consent must not be brought about by any fraud, deception, or misstatement of material facts by the other party to the alienation, but must be the voluntary and intelligent consent of both the husband and wife. Does the contract in the present case meet these requirements? The defendants were ignorant, illiterate colored people, who did not know how to write even their own names, and could have no knowledge of the written contract sued on except as they were informed by other persons. On November 28, 1882, the plaintiff held a mortgage on the property in controversy, which mortgage, including principal and interest, amounted to \$192.31. He also paid one of the defendants, Isaac Logan, \$30 in money, and agreed to pay him \$100 more, making in all \$322.31, and for this amount Logan executed the instrument in writing sued on, which was a bond and contract for the conveyance of the property in controversy to the plaintiff. Whether Logan knew what the exact consideration for this instrument was, we shall not now stop to consider, but will pass on to the more important question—the one concerning the execution of the instrument by the other defendant, Anna Logan. In this connection the questions arise: What was the real consideration for the instrument? and what was it represented to be to Mrs. Logan? The property at the time of the execution of the instrument was worth from \$400 to \$450. It was worth about \$700 at the time of the trial, which was July 22, 1884, without any improvements having been made thereon since the execution of the written instrument. The plaintiff alleged in his petition in the court below that the consideration was \$350. The instrument itself showed that the consideration was \$350. J. P. Adams, a witness for the plaintiff, who was present and heard the parties make the contract, testified that he understood the consideration to be \$350; and the court below found that such was the consideration. In fact, however, the plaintiff has all the time treated the consideration as only \$322.31, and has all the time claimed that \$100 in addition to the mortgage of \$192.31, including principal and interest, and the \$30 paid by

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the plaintiff to Logan, constituted the entire consideration and the entire purchase-money for the real estate in controversy. On November 29, 1882, the next day after the instrument had been executed by Logan, J. P. Adams, a notary public, went to the house of Logan and found Mrs. Logan alone, who had no knowledge of the transactions previously had between the plaintiff and Logan. He explained to her the nature and character of the instrument, told her the consideration therefor, and as the instrument itself showed that the consideration was \$350, and as he believed that such was the consideration, he evidently told her that such was the consideration. She refused to sign the instrument. He further told her that there was still \$100 to be paid on the contract — leaving it to be inferred, if he did not tell her so in express terms, that the claim of the plaintiff against Logan was \$250. He also referred to the mortgage held by the plaintiff on the property, of which mortgage she of course had knowledge, although it is not probable that she knew what the exact amount of the mortgage was. In all probability he inadvertently led her to believe that the claim of the plaintiff against the land was \$250, when in fact it was only \$192.31, principal and interest; and the court below found from the evidence that all this occurred. It is even doubtful whether all of the \$192.31 was due *in equity*. They also had conversation concerning the troubles existing between Logan and his wife, and after a great deal of conversation Mrs. Logan finally consented to sign the instrument upon the consideration that the \$100 still due should be paid to her and not to Logan. She at that time knew nothing about the transactions that had previously taken place between the plaintiff and Logan, or about the instrument which she executed except what was told to her by Adams; and the only way in which she executed the instrument was by touching the pen that made the mark which represented her signature. If the real consideration for the contract was \$350, then the plaintiff would still be owing the defendants on the contract \$127.69; but he has never admitted that he owes more than \$100, and has never tendered more

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than that amount, and the record does not show that he has even kept that tender good. Therefore, when Mrs. Logan executed the instrument she was laboring under at least two misapprehensions: First, she believed the claim existing against the land was about \$57.69 more than it actually was, and that the consideration for the sale of the land was \$27.69 more than the plaintiff admits it to be; and these misapprehensions were induced and brought about by Adams, who was evidently acting as the plaintiff's agent. Under the circumstances of this case, we do not think that the defendants

1. Homestead;
conveyance
without joint
consent.

ought to be compelled to specifically perform their supposed contract. The contract, under the circumstances, did not embody such a joint consent of the husband and wife as would under the homestead laws and in equity make the contract binding. Assuming that Logan himself had knowledge of all the circumstances that led to the execution of the contract, and knew precisely what the consideration was, still, Mrs. Logan did not have any such knowledge, and she signed and executed the contract under misapprehensions brought about by the plaintiff's agent. Now taking the nature and character of the contract, the inadequacy of the consideration for the property in controversy, the fact that the contract was signed at different times and without any consultation between the parties signing the same, and the fact that Mrs. Logan signed the same under misapprehensions as to the amount of the consideration and the amount of the mortgage lien, and misapprehensions induced by the agent of the plaintiff, we do not think that there is sufficient equity in the plaintiff's claim to authorize the specific enforcement thereof.

"Upon breach of a contract for the sale of real estate, it is not a matter of course for the court to enter a decree of specific performance. That will be done only when upon all the facts it is equitable it should be done. He who asks specific performance should show the facts which make such a decree equitable; and a failure to do this justifies a refusal of the decree." (*Fowler v. Marshall*, 29 Kas. 665, syl., ¶¶ 1 and 2.)

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"While in legal contemplation two persons may make a contract that would be enforced at law, yet if it should seem probable from the facts of the case that the parties did not in fact and in equity agree to the same thing, the supposed contract would not be decreed in equity to be enforced specifically." (*Burkhatter v. Jones*, 32 Kas. 5, syl., ¶ 1; same case, 3 Pac. Rep. 559.)

In the Kansas report the word "specifically" is erroneously changed to "especially." In the *Pacific Reporter* it is printed correctly. We have discussed the questions involved in this case as though Mrs. Logan only was misled into signing the contract through misapprehensions. We think, however, that the same result would follow, possibly not for stronger reasons but for slightly different reasons, if both Logan and Mrs. Logan were so misled. A contract will be specifically enforced only where its specific enforcement is equitable; and generally, only where the plaintiff has in equity and good conscience a right to demand its specific enforcement; and generally, where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced.

2. Contract;
specific per-
formance —
when enforced,
when not.

The plaintiff did not ask to have his mortgage foreclosed in this case, and therefore there was no error in the failure of the court below to order or adjudge its foreclosure. The plaintiff may still enforce his mortgage in another suit, if he chooses.

This, we think, disposes of all the substantial questions involved in this case.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY, ISAAC T. BURR, *et al.*, v. JOHN W. FLETCHER.

1. CORPORATION—*Powers.* A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operations in other states and countries, so long as it does not depart from the terms of the charter under which it was created.
2. ——— *Additional Powers.* Additional powers, auxiliary to the original design or purpose of a corporation, may be conferred thereon by the legislature of the state where the corporation is created.
3. BONDS, *Binding Guaranty of; Innocent Holder.* Under the provisions of the charter of the Atchison, Topeka & Santa Fé Railroad Company of February 11, 1859, and the terms of the statutes of Kansas, if such company guarantees a bond or other negotiable instrument and takes the same as its own and sells it, its guarantee will be binding upon the company in the hands of an innocent holder for value and without notice of the origin of its title, even if the guarantee of that particular bond, or other negotiable instrument, when made, was *ultra vires* in that special instance.
4. LEASE *by Railway Company of Road of Another Company.* Any railway company organized under the laws of this state may lease the road and appurtenances of any other railway company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease.
5. EXTENSION *of Railroad by Lease of Other Roads.* Under its charter and the statutes of the state, the Atchison, Topeka & Santa Fé Railroad Company can not only lease a Colorado railroad, but can also lease roads in New Mexico, Arizona, and Old Mexico, if each road so leased thereby becomes, in the operation thereof, a continuation and extension of the road of the Atchison company.
6. AUTHORITY *to Accept Stock and Guarantee Bonds.* Upon the facts disclosed in this case, the Atchison, Topeka & Santa Fé Railroad Company, under its charter and the statutes of the state, had authority to accept the stock of the Sonora Railway Company, of Mexico, and guarantee its mortgage bonds.
7. INJUNCTION—*When Granted, When Not; Notice.* The statute expressly provides, if a court or judge deem it proper that the defendant, or any party to the suit, shall be heard before granting a temporary injunction prayed for, that reasonable notice may be given to such party, and in the meantime a restraining order may be issued; therefore, a court or judge should never grant a temporary injunction in

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an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions, without notice, is not in accordance with a fair and orderly administration of justice.

Error from Wyandotte District Court.

ACTION brought on December 16, 1885, by *John W. Fletcher* against *The Atchison, Topeka & Santa Fé Railroad Company*, *Isaac T. Burr* and others, for the purpose, among other things, of canceling a certain contract between the aforesaid railroad company and the *Sonora Railway Company*, to discharge the *Atchison* company from all liability in respect to the guaranty in said contract, and to enjoin the directors and agents of the *Atchison* company from any further payment of interest on the bonds of the *Sonora* company. The district judge in vacation granted a preliminary injunction as prayed for. The *Atchison* company has brought the case to this court for review. The material facts are stated in the opinion.

Geo. W. McCrary, and *James Hagerman*, for plaintiff in error, *The A. T. & S. F. Rld. Co.*

Geo. R. Peck, for the holders of the bonds of the *Sonora Railway Company*.

Henry M. Cheever, and *Waters & Chase*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The facts in this case, as they appear from the record, are substantially these: The legislative assembly of the territory of Kansas incorporated, in 1859, "The *Atchison & Topeka Railroad Company*." The company was authorized to survey, construct and operate a railroad, with one or more tracks, from *Atchison*, on the *Missouri* river, to *Topeka*, and to such point on the southern or western boundary of the territory, in the direction of *Santa Fé*, *New Mexico*, as might be most convenient and suitable for the construction

A. T. & S. F. Rld. Co. v. Fletcher.

of the road; and it was also authorized to build a branch of the road to any point on the southern boundary of the territory of Kansas in the direction of the gulf of Mexico. On November 26, 1863, the name of the company was changed to "The Atchison, Topeka & Santa Fé Railroad Company." After its organization the company proceeded to build its line of railroad, so that it was put in operation from Topeka to Newton, April 15, 1872; from Newton to Dodge City, September 15, 1872; and from Dodge City to the western boundary of the state, in the direction of Santa Fé, New Mexico, January 1, 1873—making a distance altogether of over 470 miles. From the terminus of the railroad on the western boundary of Kansas to the boundary line between Colorado and New Mexico, the Pueblo & Arkansas Valley Railroad Company built a line of railway, and completed the same on July 10, 1879, a distance of about one hundred and seventy miles. From the terminus of the Pueblo & Arkansas Valley Railroad to San Marcial, N. M., the New Mexico & Southern Pacific Railroad Company built a line of railway, a distance of over 353 miles, which was put in operation October 1, 1880. From San Marcial to Deming, a point on the Southern Pacific Railroad, distant from San Marcial a little over 129 miles, the Rio Grande, Mexico & Pacific Railroad Company built a road, which was finished March 20, 1881. The Sonora Railway Company Limited is a corporation organized to build and operate a railway from the boundary line between the United States and Mexico to Guaymas, on the Gulf of California, 262 miles in length. In 1881 this company had completed only ninety miles of its railway from Guaymas, extending in a northerly direction toward the said boundary line. It was the intention of the directors of the Atchison company to build an independent road from Deming to the Mexican boundary to connect with the Sonora road, but in 1881, a satisfactory proposal having been made by the Southern Pacific Railroad Company for the joint use of so much of its track as might be required, an agreement was made between the two companies, subject to termination by either party giving two years'

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notice to the other, by which the Atchison company was permitted to run its trains, with the same rights as the Southern Pacific trains, over the Southern Pacific road from Deming to Benson, a distance of 174 miles. From Benson the Atchison company built a road called the New Mexico & Arizona Railroad, about 97 miles long, to connect with the Sonora road at or near Los Nogales, on the Mexican border. The Sonora Railway, extending from Guaymas to Nogales, was completed on November 25, 1882. In 1881 the directors of the Atchison company entered into a contract with the Sonora company by which the capital stock of the Sonora company, amounting to \$5,248,000, was transferred to the Atchison company in consideration of the issuance and delivery of \$2,700,000 of the capital stock of the Atchison company to the Sonora company and the guarantee by the Atchison company of the interest, at seven per cent. per annum, of \$5,240,000 of the first-mortgage bonds of the Sonora company. Of the bonds so guaranteed, \$4,050,000 have been marketed, and \$1,190,000 of the bonds are in the treasury of the Atchison company. Ever since the purchase of the Sonora stock and the guarantee of the interest on its bonds by the Atchison company, the Sonora road has been operated by the Atchison company, and its expenses have been borne by that company. The annual interest on the bonds of the Sonora company, so guaranteed by the Atchison company, amounts to the sum of \$283,500 a year, and is payable in July and January of each year.

On December 16, 1885, John W. Fletcher, of the city of Detroit, Michigan, claiming to be the owner of 200 shares of the capital stock of the Atchison company, of the value of \$17,000, commenced this action in the district court of Wyandotte county, in this state, for the purpose, among other things, of canceling the contract between the Atchison company and the Sonora company by which the Atchison company agreed to guarantee the interest on its bonds; to discharge the Atchison company from all liability in respect to the guarantee; and to enjoin the directors and agents of the Atchison company from any further payment of interest on the bonds.

The petition was presented to the district judge in vacation, who, without notice to defendants, or either of them, granted a preliminary injunction as prayed for, against the Atchison company, its directors, officers and agents, from paying any interest on the bonds of the Sonora company. The amount of the undertaking fixed by the district judge upon allowing the injunction was \$1,000 only. The Atchison company subsequently appeared before the judge and excepted to his ruling, and at once brought the case to this court upon petition in error, for the purpose of raising the question, whether the injunction was properly granted.

The most important inquiry is, whether the petition, taking all of its allegations to be true, shows that the contract of guarantee complained of was *ultra vires*. Upon the part of plaintiff below, it is contended that this contract was entirely unauthorized by the charter of the Atchison company, and beyond the power of the directors of that company to consent to or to execute, and therefore wholly void and of no binding force upon the corporation or its stockholders. On the part of defendants, the claim is that under the powers conferred upon the Atchison company by its charter, the subsequent legislation of this state, and the general principles of law applicable to corporations, the contract was and is valid in every respect.

The petition alleges that during the years 1882, 3-4 and 5, the operating expenses have been greater than the earnings, and but for the guarantee of the Atchison company, that the Sonora bonds would be worthless. The petition further alleges that if the Atchison company continues to operate the Sonora road and keeps the guarantee of its bonds good, it will be at the cost of the depletion of its treasury, and will render the dividends upon its stock less in amount than they otherwise would be. The question before us, however, is one of power. If the Atchison company had the authority to accept the stock of the Sonora company and guarantee its mortgage bonds, it is liable on the guarantee, whether the Sonora road be a sucker, sapping the very life of the Atchison

company as a consumer of its earnings, or a feeder, filling to overflowing a plethoric treasury. Common honesty will forbid a corporation, as it will a private individual, from evading the terms of a contract upon the ground merely that it has been unexpectedly expensive, and therefore not remunerative. In this connection, perhaps, it should be said that the directors of the Atchison company still insist that the contract with the Sonora company will prove very desirable and profitable in the end. They go farther, and say that the Atchison company and its stockholders have already received benefits from the contract by the acquisition of connecting roads and the extension of their line, so as to make a through route, which was absolutely necessary to the financial success of their company, and that thereby the earnings and profits of the line, as a whole, have been largely augmented. As to the wisdom or expediency of the execution of the contract between the Atchison and Sonora companies as an original proposition, we have nothing to do. Whether the contract between these companies be a productive or an unfortunate one for the Atchison company, is immaterial to our determination of this case. The question with us is, whether the contract was within the scope of the powers of the Atchison company to execute or perform, under any circumstances or for any purpose—not whether the Atchison company made a good or bad bargain.

Notwithstanding the terms of the charter of the Atchison company, the various provisions of the statute, and the unwritten law of comity that a corporation will be recognized and permitted to prosecute its lawful enterprises in every state which has not expressly refused its consent, the senior counsel representing the plaintiff insists that the Atchison company has no legal right by purchase, lease, or other arrangement, to operate its road or run its cars as part of its own system beyond the territorial limits of Kansas. The proposition of another counsel representing the plaintiff is, that while the Atchison company is not confined exclusively to the limits of the state, yet, that the road beyond the New Mexico line is operated with-

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out legal authority. Very able arguments were presented by the several counsel upon the hearing of the case, and very elaborate briefs have been filed with us. We have given all of these careful attention and examination, and have reached the conclusion, after much deliberation of the serious matters involved, that the proposition asserted by counsel of plaintiff limiting the power of the Atchison company in its operations wholly to the state of Kansas, or to adjoining states, is unsound and receives no support in the sections of the statute cited, or in the authorities controlling. The petition assumes that the acquirement by the Atchison company of the intermediate links between the Kansas line and the Sonora line was unauthorized, but the allegations are indefinite as to the actual relations existing between these intermediate links and the Atchison company. We think, however, it is sufficiently shown that the Atchison company is operating its line of road from Atchison and Kansas City to connect with the Sonora road at Nogales, on the Mexican border. It is a general rule that the allegations of a pleader shall be taken most strongly against himself, and therefore we are not to assume that the directors of the Atchison company, in their arrangements for operating their line from Kansas to Mexico, are acting contrary to the purposes for which the corporation was created. The presumptions are, in the absence of allegations of facts to the contrary, that the Atchison company is acting under and in accordance with the provisions of its charter and the statutes conferring authority upon it. (*A. T. & S. F. Rld. Co. v. Davis*, 34 Kas. 209.)

It is a general rule that the corporations of one state will be permitted to carry on their business and extend their operations in other states and countries, so long as they do not depart from the terms of the charters under which they were originally created. Under the comity of states, or rather, we should say, under the comity of nations, the Atchison company can exercise all the powers granted by its charter in Sonora or in the other states of Mexico, as well as it can in Missouri, Colorado, or New Mexico, if its powers thus exercised are not repugnant to or prejudicial to the interests or

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laws of Mexico; therefore, that the Sonora road is in a foreign country does not, we think, affect the case. In fact, a corporation is clothed everywhere with the character given by its charter, and the capacity of corporations to make contracts beyond the states of their creation, and the exercise of that capacity, are supported by uniform, universal and long-continued practice. (*Land Grant Rly. Co. v. Comm'rs of Coffey County*, 6 Kas. 245; *O'Brien v. Wetherell*, 14 id. 616; *Bank of Augusta v. Earle*, 13 Pet. 519; *Cowell v. Spring Co.*, 100 U. S. 55.) Hundreds of corporations are created, not strictly local in their character, as in the instance of banks and insurance companies, all of which transact business in all sections of the country. To illustrate the frequency with which corporations exercise great powers in foreign countries, counsel for defendants, upon the argument, cited the East India Company, chartered in England, but doing business throughout the East Indies; the Pacific Mail Steamship Company, a New York corporation, operating a line of steamers from New York city *via* Panama to San Francisco; the Western Union Telegraph Company, a New York corporation, having its offices in almost every city of the Union; the Maxwell Land Company, a Netherlands corporation, owning vast estates in New Mexico; and it was asserted by the same counsel that the Sonora company, alleged in the petition to be a Mexican corporation, is in fact a corporation created under the laws of Massachusetts. We may also refer, among many others that might be named, to the following corporations: The Colt's Patent Fire Arms Manufacturing Company, although an American corporation, trades extensively in England; the Liverpool, London & Globe Insurance Company, the Royal Insurance Company, the Sun Fire Insurance Company (limited), the Phoenix Assurance Company, of London, are all English corporations, but they transact business in many states of the Union; the North British and American Insurance Company, the Norwich Union Fire Insurance Society, and the Queen Insurance Company, and other English corporations, write risks in Kansas; the

1. Character and powers of corporation.

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Western Assurance Company is a Canadian corporation, accepting fire risks in this state; the Panama Railroad Company was incorporated in New York, and built a road across the isthmus of Panama; the Wells-Fargo Express Company, one of the greatest of the common carriers, is a Colorado corporation. It is a matter of general knowledge that many cattle companies recently chartered in England, now transact business, involving millions of dollars, in the western territories.

It is well settled that a railway corporation may contract to carry beyond the terminus of its own line, and such a contract will be valid, although requiring transportation in another state or country. (*Mo. Pac. Rly. Co. v. Beeson*, 30 Kas. 298; *Hutchinson on Carriers*, §§ 144, 152.) The Narragansett Steamship Company was and perhaps is now a common carrier between New York and Fall River; it receipted for a trunk to be delivered at Boston; the trunk failed to reach its destination, and in an action against the company by the owner for its value it was decided that the company was bound to carry the trunk to Boston, the same as if its vessels went to that city, and was therefore liable for the loss. (*Berg v. Steamship Co.*, 5 Daly [N. Y.] 394.) And the weight of authority is, that a railway company, deriving its powers to engage in business from its charter, which by the very terms thereof is limited to the road between certain designated points, can bind itself as a common carrier beyond its designated line. (*Perkins v. Railroad Co.*, 47 Me. 573; *Bissell v. Railroad Co.*, 22 N. Y. 258; *Hutchinson on Carriers*, § 153, and cases cited.) If railway corporations may contract for the transportation of freight and passengers in other states, and beyond their chartered *termini*, why may not such a company convey, in its own cars and trains, freight and passengers over connecting and continuous lines in other states, if it can make arrangements with such connecting and continuous lines so to do?

It is the necessary deduction from the principles announced in the foregoing decisions, that if the Atchison company is empowered by its charter and the statutes of Kansas to lease or by any other arrangement to run its cars outside of the state,

it can exercise that power everywhere — and as well in Mexico as in Colorado or Arizona.

This brings us to the construction of the charter of the Atchison company, and the legislation of the state conferring rights and powers upon railroad corporations. In interpreting the powers possessed by a corporation, we must look to the intention of the legislature in the enactment of the statute. It is manifest the legislative assembly of the territory of Kansas, in granting the charter to the Atchison company, anticipated that some day the road would become a part of a transcontinental line, and thereby that Kansas, by reason of its geographical location, would have passing over it the great traffic of the country, east and west, north and south, because it provided for building its road in the direction of Santa Fe, and also of the gulf of Mexico.

Section one of said charter reads:

“That C. K. Holliday, Luther C. Challiss, Peter T. Abell, . . . with such other persons as may associate with them for that purpose, are hereby incorporated a body politic and corporate, by the name of the Atchison & Topeka Railroad Company; and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places; may make and use a common seal and alter or renew the same; be capable of contracting and being contracted with; and are hereby invested with all powers and privileges, immunities and franchises, and of acquiring by purchase or otherwise, and of holding and conveying real and personal estate, which may be needful to carry into effect fully the purposes and objects of this act.”

Section 20 of said charter gives express authority—

“To make such contracts and arrangements with other railroads which connect with or intersect the same, as might be mutually agreed upon by the parties, for leasing or running their roads, or any part thereof, in connection with roads in other states, and to consolidate their property and stock with each other; . . . and to have all the powers, privileges and liabilities that they may hold by their several charters.”

Then, the additional authority was granted by the first and

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second sections of ch. 92, Laws of 1870, whereby the Atchison company could consolidate with a connecting road and a company of this or an adjoining state could lease the road of the Atchison company. The limitations in these sections providing for consolidation and extension were, that the lines of the road consolidated should, when completed, form a continuous line of railroad, and when a company leased its road to another railroad company, the line of the road should so connect with the leased road as to form a continuous line. We think a fair

4. Lease by railway company of road of another company.

construction of § 3 of that act to be that any railroad company may lease its road and appurtenances to any Kansas company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease. The section is as follows:

“That any railroad company shall have power to lease its road and appurtenances to any railway corporation organized under the laws of this state, *or of any adjoining state*, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease.”

The only difficulty in the construction of this section arises from the words “or of any adjoining state;” but it may be that these words refer to a corporation of an adjoining state that has come into the state and leased a Kansas road, under the terms and conditions of the statute. If, however, the legislature was inadvertently legislating in said § 3 for a railroad company of another state to lease a road not touching Kansas, we do not think this would vary the construction we have given to the other portions of the section. In the second section, the law allows the road of an adjoining state to come in and lease a Kansas road, and a Kansas company to lease the road of another Kansas company; and then the broad authority is given in § 3 for any railway company organized under the laws of this state to lease the road and appurtenances of any other railway corporation, when the road so leased shall thereby become, in the operation thereof, a continuation

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and extension of the road of the company accepting such lease. If § 3 was intended merely to give a Kansas railroad company the power to lease another Kansas railroad, it is but a repetition of said § 2, and the whole of said section is meaningless and useless; but if the section be given the interpretation as stated, it has full force and operation, and permits any Kansas railroad company to lease any other railway, whether in or out of the state, when the road so leased shall thereby become, in the operation thereof, a continuation of the Kansas company.

In 1873, the legislature passed a further act, which reads:

“That it shall be lawful for any railroad company created by or existing under the laws of this state, from time to time, to purchase and hold stock and bonds, or either, or to guarantee the payment of the principal and interest, or either, of the bonds of any other railroad company or companies, the line of whose railroad, constructed or being constructed, connects with its own.”

Under the construction we have given to its charter and the statute, the Atchison company had the right to lease the road and appurtenances of any railway company in Colorado, New Mexico, or Arizona, or elsewhere, when the road so leased, in the operation thereof, formed a continuation or extension of the Atchison road. Under this power, we think the Atchison company not only could lease a Colorado road, which is conceded by one of the counsel of plaintiff, but could go on and lease all the intermediate links between Kansas and Mexico; and when it came to the border of Mexico, it could also lease the Sonora road. Each road so leased would form, within the terms of the statute, in the operation thereof, a continuation and extension of the Atchison road. Having all this power, then clearly, under its charter and the laws of 1870 and 1873, the Atchison company had full authority to purchase and hold the stock and bonds of the Sonora company, and to guarantee the payment of the interest of the bonds of that company, because the line of that road, as constructed, connects with its own. There is no

5. Extension of
railroad by
lease of other
roads.

4. Authority to
accept stock
and guarantee
bonds.

force in the proposition that there is a missing link between Deming and Benson, a distance of about 174 miles, and therefore that the Atchison road does not continue and extend *via* the New Mexico & Arizona Railroad to the Sonora Railway at Nogales. It is true the Southern Pacific built this link and may be said to be its owner, but the Atchison company has a general use thereof with the Southern Pacific, and has the same rights therein as that company. It virtually has a lease thereon, because it is in the possession of and operating it with such rights of ownership or as lessee as is necessary for all running or operating purposes. (*Van Hostrup v. Madison City*, 1 Wall. 291; *Schuyler Co. v. Thomas*, 98 U. S. 169; *Mayor v. Railroad Co.*, 21 Md. 50.)

Something has been said about the contract between the Atchison and Sonora companies being void because the Atchison company was not actually connected at Nogales at the time of the execution of the guarantee. Even if there was anything in the proposition, in view of the terms of the statute of 1873, providing for the guarantee by one railroad company of the bonds of another company, whose road *was being constructed so as to connect with its own*, we are clearly of the opinion that as to the bonds marketed and in the hands of *bona fide* holders, the contract between the companies is binding. "Where the statute confers express authority upon the company to guarantee the bonds of another company, a mere failure on the part of the guaranteeing company to pursue the mode specified in the statute, will not invalidate such guarantee in the hands of the *bona fide* holder." (Wood's Railway Law, § 188; *Arnot v. Erie Railway Co.*, 67 N. Y. 315; *Parish v. Wheeler*, 22 N. Y. 494; *Thomas v. Railroad Co.*, 101 U. S. 86; Field on Corporations, §§ 263-267; *Bradley v. Ballard*, 55 Ill. 413; Field on Ultra Vires, 185; *Town of Coloma v. Eaves*, 92 U. S. 484; *Peoria &c. Rld. Co. v. Thompson*, 7 Am. & Eng. Rld. Cases, 101, 118; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *City of Lexington v. Butler*, 14 id. 282; *Supervisors v. Schenck*, 5 id. 772; *National Bank v. Globe Works*, 101 Mass. 57.) The Sonora road was com-

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pleted to Nogales in 1882, and the Atchison company, having been in connection with and operating that road ever since, and having repeatedly paid interest on the Sonora bonds, has clearly ratified the contract of 1881, and therefore the guarantee of the Sonora bonds is not only valid in the hands of *bona fide* holders, but such contract of guarantee is valid for all the purposes for which it was executed.

Counsel for plaintiff object to any and to all powers granted the Atchison company subsequent to the creation of its charter in 1859, and in support thereof say that the relation between the corporation and stockholders is one of contract; that the stockholder subjects his interest to the control of the proper authorities, to accomplish the object of the organization, but does not agree that the purpose shall be changed in its character at the will of the directors or a majority of the stockholders, and that the contract between the corporation and the stockholders cannot be changed without the consent of the contracting parties by the legislature or any other authority. We concede that where the power is not reserved in the legislature to repeal or amend a charter, that so far as the charter states a compact between the corporation, it cannot be changed or repealed by the legislature; but it is settled that the legislature may authorize a body of corporators to exercise new powers or franchises without impairing those previously granted; and if the new powers can be exercised without a departure from the original contract between the corporators, there is no reason why they should not be accepted and exercised on behalf of the company by a majority of the stockholders. The special point was made in the case of *C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co.*, 26 Kas. 669, that as the charter of the latter company made certain provisions for exercising the right of eminent domain, the company could not proceed to exercise that right under the general railroad law. It was held that it could, and that the general law applied to all corporations. We said in that case: "If a company had no right of eminent domain given by its special charter, the state legislature could,

2. Additional powers to corporation.

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by general law, endow it with such right; and if it had the right, the legislature could, by a similar law, enlarge its modes of proceeding." All the legislation of the state that we have referred to is in harmony with the terms and provisions of the charter of the Atchison company. Therefore no franchises are diminished, no contract impaired. At most its powers are enlarged to carry out successfully the object of its incorporation. So to speak, auxiliary powers are added, but its charter not violated, or the benefits thereby granted infringed. (*Clearwater v. Meredith*, 1 Wall. 25; *Sprigg v. Telegraph Co.*, 46 Md. 67; *Green's Brice's Ultra Vires*, 80, 84; *Fry v. Railroad Co.*, 2 Metc. [Ky.] 314.) For many purposes, the Atchison company can receive, in the transaction of its legitimate business in this state, bonds and other negotiable paper; and having received such negotiable instruments, it may sell and dispose

s. Binding guar-
anty of bonds;
innocent holder.

of the same; and in selling and disposing of the same, it may guarantee that they are genuine, and it may also guarantee the payment thereof.

Therefore, if the Atchison company had no authority under its charter and the statutes to run its cars through Colorado, New Mexico, Arizona and Sonora to the gulf of California, and was wholly confined to the transaction of its business within the territorial limits of the state, we think, within the power conferred by its charter, its guarantee of the Sonora bonds would be binding upon the company in the hands of parties purchasing them with such guarantee in good faith and without notice. (*Pendleton v. Amy*, 13 Wall. 297; *Railroad Co. v. Howard*, 7 id. 392; *Arnot v. Erie Railway Co.*, supra; *Bigelow on Estoppel*, 467; 16 Am. & Eng. Rld. Cases, 488.)

As to the equities in this case, nothing is disclosed beneficial to the plaintiff. If he was a stockholder of the Atchison company in 1881, at the time of the execution of the contract of guarantee with the Sonora company, he appears before the court as a participant, watching the venture, and, if successful, willing to enjoy the fruits thereof; but as the experiment, in his opinion, has failed, he turns to the court for assistance to

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repudiate its terms. If he is a recent purchaser of the stock, he ought to have known from the records of the company the terms and conditions of its contract, and hence was a purchaser with full knowledge of the guarantee of the Sonora bonds. Under such circumstances, he may be said to have purchased for the purpose of becoming a litigant, not merely to prevent a contemplated transaction, as in the case of *Du Pont v. Northern Pacific Railroad Co.*, 18 Fed. Rep. 467, but to annul a contract guaranteeing bonds, already executed, at least so far as the innocent purchasers thereof are concerned. Millions of the bonds have gone upon the market, and have passed into the hands of *bona fide* holders for value. Very cogent reasons should appear before a court of equity should interfere. They do not so appear. (High on Injunctions, § 1206; *Thompson v. Lambert*, 44 Iowa, 239; *Gregory v. Patchett*, 33 Beav. 595; *Watt's Appeal*, 78 Pa. St. 370; *Chapman v. Railroad Co.*, 6 Ohio St. 120; *Terry v. Lock Co.*, 47 Conn. 141; *Samuel v. Holladay*, 1 Wool. 400; *Goodin v. Canal Co.*, 18 Ohio St. 169.)

It was said upon the argument by counsel for plaintiff, that it is gross injustice to its stockholders for the Atchison company to plant its money or property in a foreign country. To this it may be answered: The stockholders control the company; the directors are elected or chosen by the stockholders; and it goes without saying that the stockholders, as well as the directors, should have at heart the highest interests of the company. Of course the directors must have some power to determine what is for the best interest of the company, and some discretion must always be left for them to exercise. Matters of policy and expediency, within the terms imposed by the charter and the statutes of the state, are for their consideration and determination, subject to the will of the stockholders, to whom they are responsible and by whom they are elected.

"Railroads, as all know, are things of growth. They enlarge with the development of the country." (*C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co.*, supra.) And railroading is a

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business wherein progress is absolutely necessary. A railroad cannot stand still; it must either get or give up business; it must make new combinations, open new territory, and secure new traffic, or lose its business and reduce its revenues. The directors, as well as the stockholders, must consider all of these things in their management of the affairs of such a corporation.

In concluding this part of the subject, we may say further, that the petition nowhere charges the directors of the Atchison company with incapacity, collusion, corruption, or fraud. It attacks the integrity of the system of the Atchison company beyond the limits of the state, but not the integrity of its officials.

This disposes of the case. A few words, however, concerning the action of the district judge in granting the temporary injunction. It is unnecessary to decide whether he was guilty of an abuse of judicial discretion sufficient of itself to cause a reversal of this case, but the practice of granting injunctions without notice to defendants, except in case of extreme emergency, deserves condemnation; and the granting of an injunction in such an important case as this, without notice, when it is within the general knowledge of every attorney and judge that the Atchison company has an officer or agent in every county of the state through which its road runs upon whom legal process may be served, is very censurable. The semi-annual interest upon over \$4,000,000 of bonds was intended to be tied up by the order of the district judge, which bonds, according to the petition itself, have been marketed, and the holders thereof are very numerous. In addition to this, the order would naturally depreciate the value of the bonds in the markets of the world, and thus innocent purchasers thereof become the immediate and the greatest sufferers. The statute provides if a court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to the party to attend for such purpose at a specific time and place, and may, in the meantime,

7. Injunction —
when to be
granted,
when not;
notice.

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restrain the party. If there was ever a case where defendants should have been notified and heard before the granting of a temporary injunction, this is one. Under the statute, instead of issuing a temporary injunction in the first instance, the judge, if proper facts had been presented to him, might have issued a restraining order and directed notice to be given. The granting of a temporary injunction, under the circumstances, was not in accordance with a fair and orderly administration of justice.

The order granting the temporary injunction will be reversed, the injunction will be wholly dissolved, and the case remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

35	253
50	790
35	253
63	807

 THE ENDOWMENT AND BENEVOLENT ASSOCIATION OF
KANSAS V. THE STATE OF KANSAS.

1. **STATUTE, Valid.** Chapter 131 of the Laws of 1885 is not unconstitutional, or void.
2. **LIFE INSURANCE—Endowments—Benefits.** A contract by an association to pay at certain stated periods of time certain sums of money as endowments to living members, or in case of their death to pay certain other sums of money as benefits to their beneficiaries, is life insurance both as to the endowments and the benefits.

Error from Lyon District Court.

ACTION brought by *The State* against *The Endowment and Benevolent Association of Kansas*, to oust it from the exercise of certain corporate powers and to dissolve the corporation. Judgment for The State, at the January Term, 1886. The defendant brings the case to this court. The material facts are stated in the opinion.

J. Jay Buck, for plaintiff in error.

S. B. Bradford, attorney general, and *J. W. Feighan*, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by the state of Kansas in the district court of Lyon county against the Endowment and Benevolent Association of Kansas, to oust it from the exercise of certain alleged corporate powers, and to dissolve the corporation. The case was tried before the court, without a jury, upon an agreed statement of facts, and upon such agreed statement of facts the court rendered judgment in favor of the plaintiff and against the defendant; and the defendant, as plaintiff in error, brings the case to this court for review.

The plaintiff, defendant in error, claims that the defendant, plaintiff in error, is exercising the powers and functions of a mutual life insurance company, in violation of chapter 131 of the Laws of Kansas of 1885. The defendant admits that it has not complied with any of the terms or provisions of said chapter 131; but claims that it is not required to do so, and this for the following reasons, among others: *First*, the act does not apply to the defendant; *second*, but if it does, then it is unconstitutional and void to that extent. Does the act apply to the defendant? The defendant claims that it does not, for two reasons: (1.) It claims that the act applies only to mutual life insurance associations, and that the defendant is not such an association. (2.) It claims that the act can apply only to such mutual life insurance associations as have been or may be organized since the act took effect, and that the defendant's organization dates from January 7, 1885, while the act did not take effect until March 14, 1885. The whole question as to whether the act applies to the defendant, or not, we think depends entirely upon the question whether the defendant is engaged in the business of life insurance, or not. That it is an incorporated association, doing business on a

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mutual and coöperative plan, with mutual rights, privileges and obligations among its members, it admits; but it claims that it is not engaged in any kind of life insurance business. Indeed, it claims that it is not engaged in an insurance business of any kind, and is not an insurance company or association of any kind. It claims that it takes no risks which may with any degree of propriety be called insurance risks; and that it makes no difference to it or to any of its members whether persons joining the association are old or young, in good health or in bad health, or whether they are likely to live long or to die soon; and, indeed, it claims that the association is nothing more than "a loaner of money." On the other hand, the plaintiff claims that the defendant is a mutual life insurance association, and nothing else. In our opinion, if the defendant is not engaged to any extent in the business of mutual life insurance, then the act will not apply to it; but if it is engaged in any such business, then the act will apply. The title to the act reads as follows: "An act providing for the organization and control of mutual life insurance associations in this state," and, of course, unless the defendant is engaged in the business of "mutual life insurance," within the meaning of this title, the act itself cannot apply to the defendant. But if the defendant is engaged in this kind of business, then we think the act will apply, and not only by the terms of this title, but also by the express provisions of the act itself. It will be seen from an inspection of the body of the act that it was the intention of the legislature that the act should apply to all mutual life insurance associations organized on the assessment plan, with a few exceptions, whether the associations were organized before the act took effect, or afterward. (See § 30 of the act.)

For the purpose of determining whether the defendant is engaged in the transaction of a mutual life insurance business, or not, we shall now proceed to consider the nature and character of its organization and the kind of business which it does in fact transact. The association is a corporation, and was organized on January 7, 1885. The charter is broad enough to authorize it to transact a mutual life insurance busi-

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ness upon the assessment plan, and also upon both an endowment plan and a death or mortuary plan, if it so chooses; but of course its charter is not conclusive as to the kind of business which it does in fact transact. But the kind of business which it does in fact transact is as follows: Its general laws make all white persons, male or female, between the ages of 18 and 55, of good moral character and temperate habits, eligible to become members of the association, and the association receives such persons as members. There are two funds provided for: (1.) The expense fund. (2.) The endowment or benefit fund. The members are divided into two classes as to the amounts of the endowments or benefits; one class receiving a \$3,000 certificate, the amount thereof to be paid to the member in five equal installments, if he or she lives, and in case of his or her death, as hereafter stated; and the other class receiving a \$5,000 certificate, also to be paid in five equal installments, or otherwise as above mentioned for the \$3,000 certificate, and all these installments are represented by coupons attached to the certificate. The membership fees, annual dues and assessments, are made larger or smaller to correspond to some extent with the amount of the endowment or benefit certificate. The members are also classified as to age, those becoming members at an earlier age paying a less amount on assessments than those becoming members at a more advanced age, and the amounts to be received by the members as endowments to become due at more widely separated periods of time. It is scarcely necessary for us to say anything further with regard to the membership fees or annual dues, or other items of the expense fund, for those items furnish but little proof as to whether the association is an insurance company, or not, or whether it does an insurance business, or not. That fund is used merely for the purpose of paying the expenses of the association. We shall therefore confine our investigation principally to the manner of creating and using the endowment or benefit fund. This fund is created by assessments upon the members, and may possibly be augmented in some rare instances by interest received on loans made from such fund.

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These assessments may be made at any time, and are made upon all the members of the association; but not less than fifteen nor more than twenty-four assessments are permitted to be made in any one year. We might take any class of the members for the purpose of illustrating what we wish to say; but taking the class of youngest members—those between the ages of 18 and 25 years—and taking those whose certificates of membership authorize them to participate in the endowment fund to the extent of \$5,000, and the assessment on each member will be \$1.50, and each member will be entitled to receive from the endowment fund every ten years from the date of his membership \$1,000, until he receives the entire sum of \$5,000; that is, five coupons of \$1,000 each are attached to each certificate of membership, and one of such coupons becomes due and is payable by the association to the member every ten years from the date of membership for the period of fifty years. If the member dies, however, before receiving the entire amount, his beneficiary named in his certificate of membership will be entitled to receive, not the full face value of the remaining coupons or the full face value of any one of them, but will be entitled to receive the actual value of the then-maturing coupon, to be calculated from the date of the issue thereof to the date of death, less such amounts as may possibly have been previously received by the member as a loan on such coupon. In other words, such a member, if he or she lives, will pay into the endowment fund every ten years from \$225 to \$360, and will be entitled to draw out of such fund within the same period of time the sum of \$1,000, and will pay into such fund during the fifty years which his or her certificate of membership runs from \$1,125 to \$1,800, and will be entitled to draw out of the fund the sum of \$5,000. If it be asked how the association can pay these large sums from such assessments, we would answer that it is not a question of law, and we cannot answer it. It would seem to us, however, that it cannot be done. It would seem to us that all possible receipts of money by the association, including payments of all kinds made by the members, and all possible

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interest received from loans, would not be anywhere near sufficient to pay the maturing coupons. And we would further think that if the members of the association entertain even the slightest hope of receiving such wonderful gains upon their investments as the foregoing figures would indicate, there would be but few lapses or forfeitures of memberships to assist in saving the association from insolvency. But there is no probability that every member will live for the period of fifty years from the date of his first becoming a member, or for the period of time during which his certificate of membership is to run; and if he should die before that time, then what will his beneficiary be entitled to receive? The agreed statement of facts answers this question, as follows:

“Upon the death of a member who has complied with the rules of the association and has paid all lawful charges, assessments and dues against him on the books of the association, the association settles with his beneficiary by paying to him the actual value of the then-maturing coupon, calculating from date of issue to date of death, less any amount already received on said coupon, that being the actual amount earned by said coupon, and no more than that amount.”

Is this amount which the beneficiary is to receive more or less than the amount to be paid in by the member? Generally, it will be very much more. Take again, for illustration, those members who became such at an early age, and who hold certificates for \$5,000, and the most that any one of them can ever be assessed for any one year is \$36, while the first-maturing coupon will earn during that same year the sum of \$100; for the amount of each coupon attached to his or her certificate of membership is just \$1,000, and the first-maturing coupon is payable in ten years. Hence if the member die at almost any time after the last half of the first year and before the first coupon becomes due, his beneficiary will be entitled to receive more than he or she has paid into the endowment fund; much more, indeed, than the amount of the money which he or she has paid into such fund, with interest, and much more even than all that he or she has paid to the association for all purposes, with interest. If the member

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dies at any time after the first coupon has become due, substantially the same result will follow. If, for instance, the member die at the end of forty-five years, and if the value of the maturing coupon is to be estimated from the date of issue to the date of death, and this is the agreement, then the beneficiary should receive forty-five fiftieths of the amount of the coupon, or \$900; while the member could not possibly have paid into the beneficiary or endowment fund more than \$360 since the last payment of a coupon, and at that time he or she had drawn out of such fund at least \$3,200 more than he or she had paid in, if indeed, he or she was able to draw out of such fund all that he or she was entitled to draw. Under such circumstances, can it be supposed that the member has received anything as a loan or otherwise on the maturing coupon? And as loans are made, if ever made, upon the security of the maturing coupon, it would seldom if ever happen that a deceased member would have received at the date of his or her death all that such maturing coupon had earned up to that time; and hence, practically, in every case of the death of a member the beneficiary would be entitled to receive something, and in almost every instance to receive much more than had been paid in by or for the member over and above the amount that had been received by him or her. But even if the value of such coupon should be calculated from the date of the payment of the last coupon, then what we have already said in connection with the death of the member during the maturing of the first coupon will apply.

What we have said with respect to the youngest members entering the association and to the \$5,000 certificates, will apply with about the same force to all the other members and to both classes of certificates. Persons from fifty to fifty-five years of age becoming members of the association are assessed at each assessment \$5.60, and one of their coupons becomes due every four years, and the last one becomes due at the end of twenty years. Now a member may die at any time, and if he or she dies, his or her beneficiary would in almost every instance receive a larger amount of money than the member

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had paid into the association over and above what he had received, and in many instances a very much greater amount. And this amount so received by the beneficiary would go, like all benefits paid in cases of insurance, to the beneficiary as his absolute property, and would not belong to the estate of the deceased member, nor be any part of the assets thereof, nor could his or her executor or administrator control it or use it for any purpose whatever. If this is not insurance, what is it? The counsel for the association claims that the association is a mere "loaner of money." But where will it get the money to loan? It agrees to pay out to its members and their beneficiaries very much more than it can possibly receive. For instance, it assesses its members who enter the association while they are less than twenty-five years of age not to exceed \$36 a year each, while it agrees to pay them at the rate of \$100 a year each. It assesses its members who enter the association at the most advanced age at which the association will receive members, not to exceed \$134.40 a year each, and agrees to pay them at the rate of \$250 a year each. And the first coupons of this last-mentioned class of members become due and are payable in four years after such members join the association. Now can such an association have money to loan at any time after its coupons begin to fall due? And when any large number of its coupons have fallen due, must it not forever afterward be hopelessly insolvent? Of course the association might do a thriving business for four or five years and until the time when its coupons begin to become due, and perhaps it hopes that from and after that time, and just before any payments or loans are made on such of the coupons as are due or will soon become due, there will be such a vast number of forfeitures or lapses of memberships, and such a vast number of accessions of new members, that the association will be saved from the utter insolvency that would otherwise necessarily follow. But this hope of the association would probably prove illusory. Forfeitures and lapses are within the control of the members themselves, and so long as it is profitable for the members to remain in the association there will be but few for-

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feitures or lapses. It is not at all probable that members will retire from the association only at a time when it is profitable to the association for them to retire. They will probably retire from the association, if they retire at all, only at time when they have just received the full payment of their matured coupons, or loans to the full amount which their maturing coupons have earned, and at times when they have nothing to lose by retiring from the association, but probably much to gain. Besides, no society should be founded upon the theory or hope of forfeitures, and lapses. No society should be founded upon the theory that those who have long been members, and have paid large sums of money into the society, shall then be crowded out and deprived of all the benefits for which they have paid their money, and new members taken in to supply their places, and possibly to undergo the same process of payments, forfeitures, lapses, and losses of benefits. We think it is clear that the money paid on the coupons, either to the members themselves while living and after the coupons have become due, or to their beneficiaries after their death, and on maturing coupons, cannot be called loans. Such payments are merely the payments of money in satisfaction of liabilities. Also, the following language from the charter and the laws of the association tends to show that the association is an insurance company and does a life insurance business, to wit:

“CHARTER.—The objects of the association are: First, to guard its members, to a great extent, against the ills of pecuniary want during life, and especially during the period of infirm old age, and at their death to make provision for their families and friends, which latter is supposed to be the only physical anxiety of dying man.”

“General laws, Article IV:

“SECTION 1. Any applicant who shall make any false statement, conceal or evade any fact, in regard to their personal history, or present condition of health, shall forfeit all benefits they may appear to have gained by becoming a member of this association.

“SEC. 2. Each applicant for membership must sign the application furnished by the association, state age and residence,

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and answer truthfully the questions propounded by the association in his or her application in regard to health and habits; and any false statement in regard to age, habits or character, or any evasion or deception whatever, will debar such applicant from any of the privileges or benefits of this association.

"SEC. 3. All applicants must be persons of sound health, good moral character, sober, and competent to gain a livelihood."

We suppose that the contracts to pay benefits to the beneficiaries of deceased members are unquestionably insurance; but are not the contracts to pay endowments to living members also insurance? The amount agreed to be paid to living members is much more than they have paid into the association, including interest, and must come, partly at least, if it ever comes, from assessments paid by other members, whose memberships have been forfeited and have lapsed; and this amount agreed to be paid to living members is in such a condition that it could not be sold or seized in execution or attached or garnished while it is maturing, nor at any time before it has become absolutely due; and if the member should die at any time while it is maturing, nothing would go to his or her executor or administrator, or become a part of the assets of his or her estate. Said chapter 131, § 9, recognizes such endowments as insurance; so, also, do the decisions of courts and the elementary authorities on insurance. In the case of *Briggs v. McCullough*, 36 Cal. 542, 550, 551, the following language is used:

"The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. It is simply an undertaking on the part of the insurer that either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party. . . . The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough shall not have died in the meantime, does not divest it of its character of life insurance." (See, also, *Charter v. John Han-*

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cock Mut. Life Ins. Co., 127 Mass. 153; *Bliss on Life Ins.*, § 6; *May on Ins.*, § 344*b*.)

We also understand that contracts to pay endowments to the living members of an association, company or society, are generally at the present time recognized by persons having connections with life insurance business and others as insurance contracts; and if such is the case, it would seem to follow that the title to chapter 131 is broad enough to permit the legislature to insert in the act, as it did, provisions relating to such endowment contracts, although under the old definitions of life insurance these endowment contracts might not be considered as coming strictly within the business of life insurance. But taking the clearly-expressed intention of the legislature as found in the act itself, the decisions of the courts relating to endowment insurance, the opinions of authors on life insurance, and the prevailing opinion of people connected with life insurance, and of people in general, we think the contracts in

Contracts, constructed to be insurance; ch. 131, Laws of 1885, valid.

the present case to pay certain sums of money as endowments to living members are insurance, as well as the contract to pay certain other sums of money as benefits to the beneficiaries of deceased members. And this being our opinion, we think that chapter 131 is not unconstitutional or void, so far as it has application to this case, for the reason that its title is too narrow, limited, or circumscribed. But it is claimed, however, that the act is unconstitutional for other reasons than that the title to the act is not broad enough to include contracts for the payment of endowments. It is claimed, for instance, that the act is unconstitutional and void, so far as it applies to the defendant, for the reason that it changes or abrogates some of the provisions of its charter. Now such legislation is permissible in this state under our constitution. The defendant in the present case was organized as a corporation on January 7, 1885, under the general incorporation laws of the state of Kansas, and chapter 131, which took effect March 14, 1885, is also a general law; and the legislature clearly has the right by general law to change, alter or repeal any portion of the general laws

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of Kansas, whether they relate to corporations, or not. Section 1, article 12, of the constitution of Kansas, provides as follows:

“SECTION 1. The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed.”

And under these provisions of the constitution, the legislature undoubtedly has the right to do all that it has done in the present case. (*Greenwood v. Freight Co.*, 105 U. S. 13, and cases there cited.)

It is further contended that the act is unconstitutional for still other reasons, but we do not think that any of such contentions can be maintained. (*The State, ex rel., v. National Association*, ante, p. 51.)

The judgment of the court below will be affirmed.

JOHNSTON, J., concurring.

HORTON, C. J.: I confess I cannot understand the workings of the endowment and benevolent association, if it is only a “loaner of money” and intends to be fair and honest in all of its representations and dealings. Why there should be so many lapses or forfeitures in the business of merely loaning money in a sound and solvent corporation, as is estimated by its officers, is difficult to conceive. If the theory of its counsel is correct, the association lives upon the misfortunes of its members, rather than upon the safe and successful investment of its funds. If the purpose of the company be interpreted by its charter and by-laws, it is nearer an insurance company than a loan company. A person to become a member must be of sound health, good moral character, temperate habits, and competent to gain a livelihood. Every applicant for membership must answer truthfully all questions propounded by the association in his or her application in regard to health and habits, age and character; and any member forfeits all benefits in the association if he or she makes any false statement, conceals or evades any fact in regard to his or her personal history or condition of health. If an

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early death is no more disastrous to the corporation than one more remote, why must an applicant, to become a member, be of sound health and endowed with all the qualities for a long life?

I concur in the judgment rendered, with some doubts, however, whether the business of the association comes strictly within the provisions of chapter 131, Laws of 1885.

35	265
48	502
35	265
52	438

THE UNION PACIFIC RAILWAY COMPANY v. G. F.
BEATTY.

RAILWAY ACCIDENT; *Physician Employed without Authority.* Where a railway passenger train is derailed and some of the passengers are injured by inevitable accident, no obligation rests upon the company to furnish medical care and attention to the injured passengers, and the company cannot be made liable for such care and attention, by the contract of the division superintendent, unless authority has been given him to commit it to such liability; and where a division superintendent employs a physician to attend upon passengers so injured, and the company denies his authority and contests its liability under the employment, it is error for the court to instruct the jury that the division superintendent will be presumed to have such authority until the contrary appears.

Error from Clay District Court.

ACTION by *Beatty* against *The Railway Company*, to recover for services as a physician and surgeon and for medicines alleged to have been rendered and furnished upon the employment of the defendant company. Trial at the May Term, 1884, and judgment for plaintiff for \$250 and costs. *The Company* brings the case here. The material facts are stated in the opinion.

J. P. Usher, for plaintiff in error.

J. S. Walker, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This proceeding is brought to reverse a judgment obtained against the Union Pacific Railway Company by Dr. G. F. Beatty for his services as a physician and surgeon, and for medicines alleged to have been rendered and furnished upon the employment of the railway company. It appears that on June 11, 1883, a passenger train of the railway company was derailed at a point on the Kansas Central division of the road, between Miltonvale and Clay Center, and that a number of the employes and passengers on the train were injured. At the instance of the station agent and also of the locomotive engineer of the wrecked train, the plaintiff went to the point where the accident occurred, and there found eight persons suffering from injuries received in consequence of the accident, two of whom were the employes of the company. He states that six of the cases proved to be of but minor importance, while the injuries received by three of the passengers were of a more serious nature. The three last named were taken to Miltonvale, where the doctor continued to give them medical and surgical care and attention for ten days thereafter. It further appears that while the plaintiff and the station agent were on their way to the scene of the accident, the station agent was injured by the bursting of a torpedo which had been placed on the track, and the treatment of this injury was also included by the plaintiff in his charge against the company. The plaintiff offered proof tending to show that the division superintendent of the railway company was notified of the accident and of the fact that the doctor was in attendance upon the persons who had been injured, and that he directed the station agent to take the injured persons to Miltonvale, and to continue the plaintiff as physician and surgeon in charge of them. He also attempted to prove that his employment by the station agent and engineer was subsequently ratified by the division superintendent. That the plaintiff was requested by the station agent and engineer to attend and take charge of the injured persons seems not to

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be questioned, but the division superintendent denied that he ever authorized them to employ the plaintiff, or in any way ratified his employment. The plaintiff presented a bill for his services for \$250, which was referred to the general superintendent of the company, who rejected the claim, and in a letter to the plaintiff gave his reasons as follows:

“Referring to your claim of \$250 for services to passengers injured by train blowing off track on Kansas Central division on night of June 11, we do not consider that the company was responsible or in any fault for the accident, and as you were not employed by the railway company to attend the injured passengers, your claim is respectfully declined.”

The plaintiff recovered for his services to the passengers and employés the full amount of his claim.

At the trial in the district court, as well as here, the plaintiff below relied upon an employment by the division superintendent, and contended that that officer had authority by virtue of his office to bind the company for the medical and surgical service which he had rendered. The principal question in the case is in regard to the authority of the division superintendent in this respect. The court below, in the trial of the cause, proceeded upon the theory that it was within the general scope of the employment of the division superintendent to contract in behalf of the company for such services as were rendered by the plaintiff.

Accordingly, the jury were instructed that the division superintendent would be *presumed* to have authority to employ the doctor and to bind the company for the medical care and protection which he gave to the injured passengers and employés, until the contrary was made to appear. This was error. To support this position, the case of *Pacific Rld. Co. v. Thomas*, 19 Kas. 256, is relied on. The position would be correct, and the authority applicable, if the alleged employment had been made for the treatment of injured employés only, but the greater part of the claim was for the treatment of passengers. In the case cited, it was held that the division superintendent will be presumed, in the ab-

Erroneous
instruction.

sence of anything to the contrary, to have authority to employ a physician and surgeon to attend an *employé* who has been injured while in the service of the company, and the case of *A. & P. Rld. Co. v. Reisner*, 18 Kas. 458, which is also cited, goes no farther. In none of the cases to which we are referred is it held that there is any implied authority in the division or general superintendent to furnish entertainment for or to employ physicians to attend upon passengers who have become sick or have been injured without the fault of the company. There is no legal obligation resting upon the company to provide medical or surgical care for those who have been injured in its service, but the grounds upon which the authority of the superintendent to make such contracts is inferred is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading. This risk is incurred by them while they are devoting their energies and labor to promote the interest of the company, and they are generally dependent upon the daily labor thus given for the support of themselves and families. Again, they are skilled in the particular branch of the service in which they are engaged, and their injury, to some extent, interferes with the business of the company, and retards the operation of the road. The company is therefore interested in the speedy cure of *employés* who have been disabled, and in their early resumption of the duties for which they have been specially trained. (*T. W. & W. Rld. Co. v. Rodriques*, 47 Ill. 188; *T. W. & W. Rld. Co. v. Prince*, 50 id. 26.)

These considerations are wanting in the case of passengers who have been injured by unavoidable accident. So far as this case is concerned, we must treat and dispose of it upon the theory that the derailment of the train was purely accidental. During the trial the defendant company offered to prove that the train was thrown off the track and wrecked, and the injuries to the passengers and *employés* were inflicted by a tornado of wind, which was so violent and sudden that it was absolutely impossible for the company, in the exercise of the greatest possible care, to resist or withstand it, and there-

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fore that it was not the fault of the defendant that the train was derailed. This testimony was erroneously excluded by the court, and there was no other given concerning the cause of the accident. We must therefore assume that the injury of the passengers resulted from unavoidable accident, and not from any negligence or fault of the company. Probably there are but few instances of injury to passengers riding upon railroad trains where negligence or fault cannot be traced to the railroad company, but in cases where there is no such negligence no responsibility can attach to the company, and no recovery can be had for the injuries sustained. It does not insure the lives or health of those who take passage upon its trains. The most that can be required is that it shall use the highest care in the conveyance of the passenger to his destination. There is no more obligation resting upon the company to provide medical care and treatment for passengers unavoidably injured, than for passengers who become sick during the journey over the road. In either case the full measure of the duty of the company is to carry the passenger in the condition in which he may be found to his destination. Beyond this the company has no interest in the passenger, and therefore has no such concern for his health and soundness that it has in its employes who may be injured while in its service. To furnish medical care and treatment for passengers in such cases would be a mere gratuity, and the funds of the corporation cannot be thus dispensed by the division superintendent without authority from the board of directors.

In *Cox v. Midland Counties Railway Co.*, 3 Welsb. H. & G. 268, the station-master of the railway company at Birmingham, who acted there as chief officer of the passenger and other departments, employed a surgeon to perform a surgical operation upon a passenger injured by a train of the railway company, and the company contested its liability for the service on the ground that its servants had no authority to bind them by contracts of that description, and the court held that there was no liability against the company therefor, because the power to enter into the contracts was not incident either to

the employment of the station-master or of the superintendent of the road. Perhaps it is true that in certain emergencies the superintendents of railroads are authorized to provide medical and surgical care for injured passengers, and to bind the railroad companies for the payment of such services, and it is probably well that such provision should be made; but in those cases it will not be difficult to show the authorization, or a recognized custom or usage of the company to furnish medical attendance to passengers injured by inevitable accident. In the absence of testimony of express authority from the company, or of a custom or usage from which authority might be implied, the company cannot be bound by such contracts made by the superintendent or his subordinates. If the injury to the passengers resulted from the negligence of the carrier, other considerations would enter into the case, which might warrant the implication of authority in the superintendent or some general agent of the company to provide medical attendance and entertainment for them; but whatever might be the rule in that case, we are of the opinion that there is no such presumption of authority in the division superintendent where the passengers are injured through no fault of the company.

It necessarily follows that there was error in the charge of the court for which a new trial must be given; and as the other questions presented by the plaintiff in error may not again arise, it becomes unnecessary to notice them here. The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

THE STATE OF KANSAS v. ROBERT WHISNER.

1. **PROHIBITORY LAW; *Statements of Witnesses; Limit of Conviction.*** Where a county attorney, acting by virtue of the provisions of § 8, chapter 149, Laws of 1885, commonly called the prohibitory liquor law, examines various witnesses, who give their testimony before him, which is reduced to writing and sworn to by them and filed with the information charging the defendant with violations of said chapter 149, and the information so filed is verified by the county attorney on information and belief only, and the names of the witnesses so examined are indorsed upon the information, *held*, that the defendant cannot be convicted of any violations of said act not therein referred to or set forth; and further *held*, that in this case the information and the sworn statements filed with it disclose with great particularity the nature and cause of the accusation made against the defendant.
2. ——— ***Due Process of Law.*** The phrase "due process of law" means law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights.
3. **PROCEEDING, by *Due Process of Law.*** Where a defendant is charged in an information filed against him in the district court with violations of the prohibitory liquor law of the state, and there is filed with the information the sworn statements of several witnesses, whose names are indorsed upon the information, tending to describe and set forth with greater certainty and precision the offenses charged in the information, and the defendant is allowed to appear in the court and defend by counsel, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and is given a speedy public trial, by an impartial jury of the county in which the offenses are alleged to have been committed, the proceeding against him is clearly by "due process of law."
4. ——— ***Statements of Witnesses; Complaint Without Cause.*** Where the county attorney files with the information the sworn statements of witnesses disclosing the fact that the defendant has committed offenses against the provisions of the prohibitory liquor law, the defendant, upon the trial, has no right to complain that the witnesses making said statements were required to appear by subpoena before the county attorney and give their testimony. As to such matter, the defendant stands before the court as if the witnesses had voluntarily appeared and made their statements before the county attorney concerning their knowledge of the offenses he has committed against the provisions of said act.

35	271
45	340
46	535
35	271
50	369
35	271
51	177
52	52
35	271
75	420

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5. **INFORMATION; Sufficient Verification.** Where the affidavit annexed to an information charging the defendant with violations of the prohibitory liquor law is verified by the county attorney "to the best of his information and belief," and the sworn statements of witnesses are filed by the county attorney with the information, disclosing the fact that offenses have been committed by the defendant against the provisions of said act, as charged in the information, *held*, that the verification sufficiently complies with the requirement of the statute.
6. **JURY; Challenge to Array.** Where twenty-six persons are summoned to appear as the regular panel of petit jurors, and it is affirmatively shown on the part of the defendant on trial for a misdemeanor that two or three of the panel are not eligible to be returned on the jury list, *held*, that the court has ample power to purge the jury without sustaining a challenge to the array; and *held*, further, that in such a case there has not been such a palpable disregard of the statute in selecting and drawing the regular panel of jurors as to require a challenge to the array to be sustained. (*Railroad Co. v. Davis*, 34 Kas. 199.)
7. **APPROVED LAWS, Deposit of.** The governor of the state is required by the statute to cause all bills or acts, which have become laws by his approval, to be deposited in the office of the secretary of state without delay. (Comp. Laws of 1879, ch. 102, art. 1, § 5.)
8. **MESSAGE, Approving Act.** There is no constitutional or statutory law which requires the governor to return to either house of the legislature any bill or act after it has received his approval and signature, and if the governor reports to the house of representatives his approval of a bill, it is simply a matter of courtesy only.
9. **ACT, Unaffected by Subsequent Message.** After an act of the legislature has, in a regular and constitutional mode, passed both branches thereof and has been properly signed by the officers of both houses, and has been regularly presented to the governor for his approval, and he has approved and signed the same without any mistake, inadvertence or fraud, and thereafter has voluntarily deposited it with the secretary of state, as a law of the state, it has passed beyond his control; its status as a law has then become fixed and unalterable, so far as he is concerned, and any subsequent message by him to the house of representatives, notifying that body of his approval of the act, but setting forth his objections to certain provisions of the act, and giving his construction thereof, does not qualify or otherwise affect the act, or the validity of his approval.

Appeal from Linn District Court.

ON July 15, 1885, the county attorney of Linn county filed the following information against *Robert Whisner*, (omitting court and title:)

Statement of the Case.

"Whereas, upon a certain inquiry by and before me, lately instituted and carried on at the city of La Cygne, in said Linn county, in the state of Kansas, into and concerning certain violations of an act of the legislature of the state of Kansas, entitled 'An act amendatory and supplemental to chapter 128 of the Session Laws of 1881, being an act entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes,' approved March 7, 1885, and of the act to which said act is amendatory and supplemental, to me theretofore duly alleged and notified, the testimony of certain witnesses, to wit, John L. Beckman, John R. Gaines, Gala J. Goss, William L. Michael, Elmer E. Deel, then and there attending, appearing and deposing before me, in obedience to my certain subpoena so commanding, theretofore duly issued and served, each of said witnesses having been by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and true answers make to all questions which by me might be propounded touching any violations of the provisions of said acts, or of either of them, and which testimony was then and there reduced to writing, and signed by said witnesses respectively, and is now filed herewith, did and does disclose that one Robert Whisner had committed, at said Linn county, in the state of Kansas, the several certain offenses hereinafter specifically and formally charged as the same are hereinafter charged; and did have and has in his possession at the place hereinafter charged and described, the property hereinafter described, and then and there kept and used and keeps and uses the same for the unlawful purposes hereinafter charged:

"Now, therefore, I, Selwyn Douglas, county attorney of Linn county, in the state of Kansas, in the name and by authority of the state of Kansas, come now here and give the court to understand and be informed that Robert Whisner, at the county of Linn, in the state of Kansas, on the 1st day of May, 1885, without having procured from the probate judge of said county any permit to sell intoxicating liquors, did then and there unlawfully sell and barter spirituous, malt, vinous, fermented and other intoxicating liquors."

[The 2d, 3d, 4th, 5th, 6th and 7th counts are omitted, as they are substantially in the form of the first count, excepting the offenses therein charged are alleged to have been committed on May 30, 1885, on June 13, 1885, on June 15, 1885, on June 17, 1885, and on June 22, 1885, and excepting that the

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second and following counts recited that the sale was other than the one last charged.]

"Wherefore, I, Selwyn Douglas, county attorney as aforesaid, in the name and by the authority of the state of Kansas, do pray that a warrant may issue for the arrest of the said Robert Whisner; and that such other and further proceedings may be had as in such cases provided by law.

SELWYN DOUGLAS,
County Attorney of Linn County, Kansas."

"STATE OF KANSAS, LINN COUNTY, ss.—Selwyn Douglas, county attorney of said Linn county, being by me first duly sworn, deposes and says that the foregoing information subscribed by him is true, according to the best of his information and belief; and he further says that no permit has ever been issued to said defendant, Robert Whisner, by the probate judge of said county to sell intoxicating liquors.

SELWYN DOUGLAS.
"Subscribed and sworn to before me, on this 15th day of July, 1885.

[Seal.] W. A. C. KERMAN,
Clerk District Court Linn Co., Kansas."

The testimony of the following witnesses indorsed on the information, to wit, John L. Beckman, John R. Gaines, Gala J. Goss, William L. Michael and Elmer E. Deel, was reduced to writing and filed with the information. On said 15th day of July, a warrant was issued for the arrest of the defendant, and said defendant, after having been taken into custody, entered into a recognizance for \$500 for his appearance at the next term of the court. On July 22, 1885, the defendant made a motion to discharge the recognizance for various reasons, among others, that the information was not verified according to law.

Trial had at the November Term of the court for 1885. Before proceeding to trial, the defendant interposed a challenge to the array of the regular panel of jurors, on the ground that the jury had been illegally impaneled. After the hearing of the evidence, the court overruled the challenge. The defendant also objected to the introduction of any testimony, which objection was overruled. Thereupon, the defendant moved the court to require the state to elect upon which of the several counts in the information it would rely. The court granted the motion, and the state elected to proceed upon the

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1st, 2d, 3d, 5th, and 7th counts in the information, and a *nolle prosequi* was entered as to the 4th and 6th counts. The jury returned a verdict of guilty against the defendant, as charged in the information, upon the 1st, 2d and 7th counts thereof, and not guilty as to the 3d and 5th counts. On November 21, 1885, the defendant filed a motion for a new trial, which was overruled. On the same day the defendant filed a motion in arrest of judgment, which was overruled, excepting as to the 7th count, and the court refused to sentence the defendant thereon; but thereafter sentenced the defendant upon the 1st count to pay a fine of \$250 and to be imprisoned in the county jail for the period of sixty days; and upon the 2d count to pay a fine of \$250 and to be imprisoned in the county jail for the period of sixty days; and that he be adjudged to pay all the costs. The defendant excepted to all the rulings of the court, and brings the case here.

W. R. Biddle, and *J. D. Snoddy*, for appellant.

Schwyn Douglas, county attorney, and *Blue & Rich*, for The State.

The opinion of the court was delivered by

HORRON, C. J.: The defendant was convicted upon two separate counts of an information, charging him with violations of the provisions of the prohibitory liquor law. He was sentenced to pay fines amounting in all to \$500, and to terms of imprisonment aggregating four months in the county jail of Linn county. From the judgment he appeals. It is urged that the information is insufficient, and that the proceedings against the defendant were not by due course of law. In support thereof, it is said that the information did not give to the defendant the nature and cause of the accusation against him, and that the proceeding against him was not by the ordinary course established at the common law. Neither of these points is well taken.

In prosecutions of this character, it is not necessary to state the kind of liquor sold, or the name of the person to whom

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sold, for the statute expressly and specifically provides that these things need not be stated. (Laws of 1885, ch. 149, §14; *The State v. Schweiter*, 27 Kas. 499; *The State v. Sterns*, 28 id. 154; *The State v. Olferman*, 29 id. 502; *The State v. Shackle*, 29 id. 341; *The State v. Brooks*, 33 id. 708.) In this case, however, the defendant had no reason to complain of being ignorant as to the offenses he was called upon to defend. The testimony of the principal witnesses as to sales of intoxicating liquors made by him was reduced to writing and filed with the information. Therefore, before the trial began, he was notified that John Beckman, whose name was indorsed upon the information as a witness, had testified that he had frequently drank whisky and beer in his saloon at different times since March 10, 1885; and that about the first of May, 1885, John Gaines treated him in the saloon to a glass of whisky. He was also notified by the written testimony that John Gaines, whose name was upon the information, had testified that during the spring and summer of 1885 the defendant was keeping a billiard saloon in La Cygne, and that about May 1, 1885, he bought of him, in his saloon, two glasses of whisky, which he poured out; and that about June 15, 1885, he bought of him, in the same saloon, a drink of whisky and cider mixed together, and at the same time saw other parties get and drink the same kind of mixture. Other witnesses, whose names were upon the information, had also testified to specific sales of intoxicating liquors made by the defendant in his saloon in 1885, and before the filing of the information, and also the kind of intoxicating liquors sold by him at said times. Of course the defendant had the right to suppose that these witnesses would testify upon the trial to the same facts set forth in the testimony filed with the information. Therefore he was given fair notice of the offenses charged against him; of the kind of intoxicating liquors sold by him; and when he sold the same and to whom he sold the same. In this case, the letter and spirit of §10 of the bill of rights were complied with, as the defendant was informed of

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the nature and the cause of the accusation against him with great particularity.

An attempt is made to question the constitutionality of § 8 of said chapter 149, giving county attorneys power to subpoena and examine witnesses concerning violations of that act. From the record, however, this question is not before us for decision. None of the witnesses who were subpoenaed and examined before the county attorney of Linn county on July 13, 1885, concerning the violations of the provisions of the prohibitory liquor law by the defendant, are here complaining,

4. Statements of witnesses; complaint without cause.

and the defendant has no right to complain for them. He stands before the court in reference

to such matter as if all the parties to the statements filed with the information had voluntarily appeared before the county attorney, and had made before him, at their own instance, the statements. The county attorney clearly had the right, for the benefit of the defendant, to file with his information a bill of particulars, or any sworn statements, showing what specific offenses he intended to charge, when he ver-

1. Prohibitory liquor law; statements of witnesses; limit of conviction.

ified the information. All of this enabled the defendant to prepare his defense, and after such statements or evidence had been filed with the information, the defendant could not be convicted

of any offense not therein referred to or set forth. (*The State v. Brooks*, supra; *The State v. Clark*, 34 Kas. 289.) It has already been decided by the supreme court of the United States, in *Foster v. Kansas*, 112 U. S. 201, that the prohibitory liquor law is not repugnant to the constitution of the United States; neither is it in conflict with any of the provisions of the constitution of this state. (*Prohibitory Amendment*, 24 Kas. 700; *Intoxicating-Liquor Cases*, 25 id. 751; *The State v. Schweiter*, supra; *The State, ex rel., v. Foster*, 32 Kas. 14.) And we can perceive no fundamental rights in that system of jurisprudence, of which ours is derivative, which have in any

2. Due process of law.

way been disregarded. The words "due process of law" do not mean and have not the effect of limit-

ing the powers of the state to prosecutions for crime by indict-

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ment, "but these words do mean law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights." (*Hurtado v. The People*, 110 U. S. 516; *Walker v. Sauvinet*, 92 id. 90-93.) The law authorizing the filing of informations in such a case as this, is not in conflict with our constitution, or the constitution of the United States. (*The State v. Barnett*, 3 Kas. 250; *Cooley on Constitutional Limitations*, 5th ed., 376; *Kallock v. Superior Court*, 56 Cal. 229; *Ex parte Wilson*, 114 U. S. 417.)

A sufficient information was filed against the defendant; with the information was filed the sworn statements of the important witnesses whose names were indorsed thereon. Thereby the defendant was fully apprised of the nature of the charges against him, so that he might know what he was to answer. The proceeding against him was upon inquiry; he was heard before he was condemned, and no judgment was rendered until after trial. Therefore, there is no force whatever in the assertion "that the proceeding was not by due process of law."

Section 9 of said chapter 149 provides that when a county attorney files a complaint or information with a statement of any witness that intoxicating liquors are being unlawfully sold, the information may be verified by the county attorney upon information and belief. Sec. 67a of the criminal code, Comp. Laws of 1879, reads:

"When an information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information and belief."

It is insisted that as the verification by the county attorney to the information says the same "is true according to the best of his information and belief," it does not comply with the requirement of the statute, and therefore the information is not verified. We think the verification a sufficient compliance with the statute. A person who makes such a verification imports that he has information and is entitled to entertain the belief he expresses,

3. Proceeding
by due process
of law.

5. Information;
sufficient verification.

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and when he swears "to the best of his information and belief," he swears that he has information and belief. (*Roe v. Bradshaw*, Ct. of Exchequer, vol. 1, p. 106.)

Upon the trial, the defendant interposed a challenge to the array of the regular panel of the jurors, on the ground that the jury had not been selected from the list of tax-payers for each township for the previous year, 1884, according to law.

The challenge was overruled, and we think rightly.

6. Jury; challenge to array.

Of the twenty-six persons summoned to appear, two, Faber and Coffin, seemed to have been clearly ineligible. These were discharged by the court. Another juror, G. W. Platt, was a resident of Paris township when the list of jurors was returned, and was not on the assessment roll of that township. At the time of the trial he had lived in Paris township only one year, but had lived in Lincoln township, in Linn county, over sixteen years, and was on the assessment roll of Lincoln township in 1884. The neglect or refusal of officers to comply with the statute in the listing and selection of jurors, must be affirmatively shown; and as in this case only three persons were upon the panel drawn as jurors who were not eligible to be returned on the jury list, we do not think there was such a palpable disregard of the statute as to require the challenge to the array to have been sustained. (*A. T. & S. F. Rld. Co. v. Davis*, 34 Kas. 199.) In the case of *The State v. Jenkins*, 32 Kas. 477, the jury list for 1883 was drawn directly from the assessment rolls of 1883, not from the preceding year, 1882, at all.

Finally, it is claimed that said chapter 149 is not a law of the state: this upon the alleged ground that it has never received the approval of the governor, that his objections thereto were never considered, and that the bill was never passed by a vote of two-thirds of each house, notwithstanding such objections. The facts are these: The act in question, known as house bill No. 367, entitled "An act to prohibit the manufacture and sale of intoxicating liquors," etc., having in the regular and constitutional mode passed both houses of the legislature, and having been properly signed by the officers

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of both houses, was, on March 7, 1885, regularly presented to the governor for his approval; on that day he approved and signed the same, and deposited it at ten o'clock of said March 7th, with the secretary of state. Subsequently, the governor sent a message to the legislature stating that he had approved house bill No. 367, but in his message he made objections to several sections of the bill, and attempted to give his own construction of some of the provisions thereof. It is very doubtful whether his interpretation of the act can be sustained. (House Journal of 1885, pp. 1221-1222.)

Upon this state of facts, we are clearly of the opinion that the act was properly approved and signed by the governor, and is a law. The constitutional provision bearing on the subject is § 14 of article 2, and is in these words:

“Every bill and joint resolution passed by the house of representatives and senate, shall, within two days thereafter, be signed by the presiding officers, and presented to the governor; if he approve, he shall sign it; but if not, he shall return it to the house of representatives, which shall enter the objections at large upon its journal, and proceed to reconsider the same. If, after such reconsideration, two-thirds of the members elected shall agree to pass the bill or resolution, it shall be sent, with the objections, to the senate, by which it shall likewise be reconsidered, and if approved by two-thirds of all the members elected, it shall become a law. But in all such cases the vote shall be taken by yeas and nays, and entered upon the journals of each house. If any bill shall not be returned within three days (Sundays excepted) after it shall have been presented to the governor, it shall become a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevent its return, in which case it shall not become a law.”

This requires the governor, if he does not approve a bill, to return it to the house of representatives, which shall enter the objections at large upon its journal, and proceed to reconsider the same. By the provisions of article 4, ch. 102, statutes of 1879, the secretary of state is charged with the safe-keeping of all enrolled bills and resolutions, and also of the laws of the state; and § 5 of article 1 of said chapter 102 spe-

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cifically directs that the governor "shall cause all acts and joint resolutions which have become laws or taken effect by his approval or otherwise, to be deposited in the office of the secretary of state without delay." There is no constitutional or statutory law which requires the governor to return to either house of the legislature any bill after it has received his approval and signature, nor is such the practice. As a matter of courtesy, the governor reports, through his private secretary, to the house of representatives his approval of the bill. This, and nothing more. The bill in this case was never returned by the governor to the house of representatives, and the message which he transmitted to the house, subsequently to his approval, was never attached thereto or made a part thereof. It is not claimed that the governor signed the bill through mistake, inadvertence, or fraud. On the other hand, the facts clearly show that he approved and signed the bill voluntarily, and that he deposited it with the secretary of state as a law of the state. Therefore after the bill had been approved and signed by him, and he had deposited the same with the secretary, it passed beyond his control. Its *status* then had become fixed and unalterable, so far as he is concerned. His subsequent message was no part of his approval or signature, and whether his objections to the bill and his construction thereof after he had approved and deposited the same with the secretary of state were good or bad, is wholly immaterial. The act in controversy was regularly passed by the legislature, was approved and signed by the governor, was deposited with the secretary of state, and therefore has received all the constitutional sanctions required to give it effect. (Comp. Laws of 1879, ch. 102, articles 1 and 4; Cooley's Const. Limitations, 5th ed., 184-188; *People v. Hatch*, 19 Ill. 283; State Constitution, article 2.)

The judgment of the district court must be affirmed.

All the Justices concurring.

7. Approved laws,
deposit of.

8. Message ap-
proving bill.

9. Act unaffected
by subsequent
message.

KENTUCK B. PIATT, *et al.*, v. F. A. HEAD.

ARGUMENT, Waiver of Right to Make. Where a case is tried before the court without a jury, and at the close of the evidence the plaintiff's counsel, in the hearing of the court, ask the defendant's counsel whether they desire to argue the case or not, stating that the plaintiff's counsel do not wish to do so, and the defendant's counsel, hearing the same, do not answer, and the court then renders its decision, which is adverse to the defendant, and the defendant's counsel except to the decision, and then ask the court to permit them to argue the case, and the court refuses, *held*, not error; that defendant's counsel, by their silence, waived their right to make an argument at that time or at any time prior to their argument on their motion for a new trial.

Error from Washington District Court.

THE opinion states the nature of the action, and the facts. Trial at the November Term, 1884, and judgment for plaintiff *Head*. The defendants *Piatt* and *Bond* bring the case to this court.

A. S. Wilson, and *A. M. Hollowell*, for plaintiffs in error.
Lowe & Smith, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by F. A. Head against Kentucky B. Piatt, F. M. Lavering and H. J. Bond, on two promissory notes executed by Piatt to Lavering and indorsed to Head, and a mortgage on real estate executed by Piatt to Lavering to secure these two notes and to secure another claim. Lavering owned and had become entitled to recover on this other claim, and set up the same in his answer, and also asked for the foreclosure of the mortgage. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff on both of his notes and the mortgage, and also in favor of Lavering on his claim and the mortgage; and Piatt and Bond, as plaintiffs in error, bring the case to this court, making Head alone the defendant in error. Lavering

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has not been made a party to the case in this court. Bond, in the court below, made default, not having either answered or appeared in the case, although duly summoned, and the pleadings of the plaintiff, Head, unquestionably authorized the judgment that was rendered in his favor. Hence Bond can certainly have no grounds for a reversal of the judgment of the court below. As to Piatt, he consented that judgment should be rendered against him upon one of the promissory notes sued on by Head, and also upon the claim set up by the defendant Laving, and that the mortgage should be foreclosed with respect to both these claims. Hence Piatt has no ground for alleging error, except with respect to the other promissory note sued on by Head and the mortgage so far as it secures such note. This other promissory note last mentioned was executed December 26, 1882, by Piatt to Laving for \$400, and was indorsed by Laving to Head, and became due on February 1, 1883. The defendant alleged a failure of consideration with respect to this note; that it was indorsed to Head after it became due, and that Head had knowledge of such failure of consideration. And these were the only disputed questions of fact submitted to the court below for decision. We shall assume for the purposes of this case that there was a failure of consideration for the note. There was also some evidence introduced by the defendant Piatt, tending to show that the note was transferred to Head after maturity, and that he had notice of the failure of consideration. But, on the other side, there was ample evidence introduced to show that the note was indorsed to the plaintiff before maturity, and that he did not have any notice of any failure of the consideration therefor. The court found generally in favor of the plaintiff and rendered judgment accordingly, without any argument having been made on the evidence by counsel on either side. This judgment was rendered on December 2, 1884. On December 3, 1884, the defendants, Piatt and Bond, filed a motion for a new trial, and also filed an affidavit in support of their motion. The grounds set forth in their motion for the new trial are as follows:

Piatt v. Head.

"1. Irregularity in the proceedings of the court during the trial.

"2. Abuse of discretion on the part of the court in refusing to allow said cause to be argued by counsel.

"3. Accident and surprise which ordinary prudence could not have guarded against.

"4. The decision is not sustained by sufficient evidence.

"5. The decision is contrary to law.

"6. Errors of law occurring at the trial and excepted to by the defendants at the time.

"7. Newly-discovered evidence material for the said defendants, which they could not have discovered and produced at the trial by the use of ordinary diligence."

The principal grounds urged for the new trial were the second, fourth and fifth, as above set forth. The defendants, in support of said second ground, filed an affidavit of A. M. Hallowell, the attorney for the defendants, Piatt and Bond, which affidavit tended to support such ground. On the other side, the plaintiff filed a counter affidavit of J. G. Lowe, which states, among other things, the following:

"After the evidence had been all introduced in the cause. Charles Smith, partner of the affiant and one of the attorneys for plaintiff, asked of A. M. Hallowell in a loud voice, and in the presence and hearing of the court, two or three times, if he wished to argue the case, and stated that counsel for the plaintiff did not wish to argue the cause unless counsel for defendant should wish to do so. Counsel for defendant remained quiet, and did not answer counsel for plaintiff nor demand a right to argue. The court then rendered judgment for plaintiff, and asked defendant's counsel if he wished to except to the ruling; counsel for defendant then took an exception, and then told the court that he would like to argue the cause. The court then informed counsel that he was satisfied, and did not care then to hear any argument. Every legal point in the case had been as fully argued by counsel for both parties as they desired, without limit or restraint."

This motion for a new trial was fully argued upon both sides, and was overruled by the court, to which ruling the defendants excepted. The only question presented to this court is, whether the court below abused its discretion in refusing to hear an argument in the case after the evidence had all been

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introduced and before a motion for a new trial was filed. After the motion for a new trial was filed, and upon such motion, a full argument was had in the court below, but the real question presented to this court is, whether the court below erred in refusing to hear such argument prior to the filing of the motion for the new trial. Of course the court below knew what had occurred in the case; and taking the affidavit of J.

Waiver of right
to argue case.

G. Lowe to be true, which it evidently did, and which we think we must also do, we cannot under the circumstances say that the court below committed any material error. We think the defendants waived all their right to argue the case upon the evidence before the decision. It seems that the case had already been sufficiently argued upon all the legal questions involved in the case. When the plaintiff's counsel asked the defendants' counsel whether they desired to argue the case or not, stating that the plaintiff's counsel did not wish to do so, and the defendants' counsel failed and refused to make any answer, the court had a right to infer that the defendants' counsel did not wish to argue the case, and had a right to render its decision as it did, without first hearing any argument upon the evidence. There is no claim or pretense that the defendants' counsel did not hear the plaintiff's counsel, and unquestionably they did. The affidavit above quoted shows that counsel for the defendants did not ask to argue the case until after the decision of the court below had been made, and until after they had taken an exception to such decision. Besides, in the present case the entire case was submitted to the court for decision. The court was the trier of the facts of the case as well as of the law, and the defendants on the motion for the new trial had a right to make and did make an argument to such trier upon the entire case, the facts, the evidence, and the law. Under such circumstances, we think a clearer case of error and a stronger case for reversal should be made out than where the case has been tried before a jury.

In the case of *Douglass v. Hill*, 29 Kas. 527, the case was tried before a jury, and a strong case of error was made out. In that case there was really no excuse for refusing to permit

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an argument to be made to the jury, and of course the judgment rendered therein had to be reversed. In this case, however, we think there was not only a sufficient excuse but a justification for the action of the court in rendering its decision without arguments having first been made; and we think there was a sufficient excuse for the refusal of the court to hear arguments after the decision was made and prior to the time of the hearing of the motion for the new trial. Bond was in default, and had no right to make any argument at all, and Piatt's counsel, by his action, or rather silence when he should have spoken, waived his right to make an argument at the close of the trial.

Before closing this opinion, we might suggest the question that if there was really a failure of consideration for the \$400 note sued on, by Head, why did the defendant Piatt voluntarily permit a judgment to be rendered against him and in favor of Laving, the original payee of said \$400 note, for money due on still another claim still held by Laving, and for the foreclosure of this same mortgage, which secured all the claims? He knew that the said \$400 note was a negotiable instrument, and that Head claimed to be an innocent holder thereof for value and by indorsement before maturity, and he should have been prepared to defeat all claims of Laving up to the amount of this note.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. WILLIAM H. IRWIN.

PRACTICE; Damages; Erroneous Instruction. In an action against a railroad company to recover for personal injuries where the plaintiff specifically alleged that the injury was caused by the negligence of his coëmployé, the engineer of the train, and no other basis of recovery was stated, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that the

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plaintiff might recover if the injury was caused by the negligence of the fireman.

Error from McPherson District Court.

ACTION by *Irwin* against *The Railroad Company*, to recover damages for personal injuries. Trial at the October Term, 1884, and judgment for plaintiff for \$300, with interest and costs. The defendant company brings the case here. The opinion states the facts.

James Hagerman, A. A. Hurd, and Robert Dunlap, for plaintiff in error.

Frank G. White, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by William H. Irwin against the Atchison, Topeka & Santa Fé Railroad Company, to recover for personal injuries sustained by him while serving the company as brakeman. It was tried by a jury, and resulted in a verdict and judgment in favor of the plaintiff. The defendant brings the case here upon alleged errors in the instructions given to the jury. The plaintiff, after stating his employment as brakeman, and that while so engaged on April 14, 1883, it became necessary for him to couple together the engine and a certain car, set forth the cause of the injury and the liability of the defendant therefor, in the following language:

“That the engineer of said train, who was then an employé of the defendant, and a coemployé of the plaintiff, and controlling and operating his said engine at the time, backed his said engine toward the plaintiff and the said car for the purpose of permitting the plaintiff to couple together the engine and said car; that when the engine had approached to the proper distance from the said car, the plaintiff signaled the engineer to stop the engine, and stepped in the proper manner, and at the proper time, between the engine and the car for the purpose of making the coupling aforesaid; but plaintiff avers that the said engineer, neglecting the legal duty which he owed himself, this plaintiff, and defendant, negligently and

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unlawfully failed, neglected and refused to stop his said engine when so signaled as aforesaid by plaintiff, or to pay any attention to the plaintiff's said signal, by reason whereof, through the gross negligence and default of the said engineer, and without any negligence or fault of the plaintiff, the said engine was propelled against the said car with such terrific force and a terrible jar as to nearly throw the plaintiff from his feet, and to catch the thumb and finger of his left hand between the bumpers of the said engine and car," etc.

The petition contains no averment that the injury occurred by reason of any other cause, or through the negligence or fault of any coëmployé of the plaintiff, other than the engineer. The defendant denied the allegations of the plaintiff, and alleged that the injury resulted from the plaintiff's own carelessness.

The jury were instructed, among other things, that—

"The plaintiff here seeks to recover against the defendant for a claimed injury which he says he received while in the employment of the defendant company in the operation of its railroad, and he says that he is entitled to recover by reason of the negligence of certain other employés of the company, to wit, the engineer or fireman, or both. Now I say to you that under the laws of this state, if this injury occurred while these parties were in the performance of their duty in operating cars on the line of this defendant's railroad, then the acts of this engineer and fireman were the acts of this defendant, and they are liable for the acts of the engineer and fireman."

In another part of the charge it is stated :

"Now the question is, what may be the improper acts of these men in the law, so that this defendant company will be liable for it? The rule of law incumbent upon them was—both the engineer and fireman—that in the performance of their duties in operating the engine at the time the accident occurred, was the use of ordinary care and attention," etc.

And in still other portions of the charge the jury were told that the defendant would be liable for the negligence of the fireman as well as for that of the engineer. The exceptions taken to these instructions are well founded. It is well established that the plaintiff is not entitled to recover upon any other basis

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Pleading; erroneous instruction.

or cause of action than that alleged in his petition. The only issue tendered by him was the alleged negligence of the engineer. The petition contained no general charge that the injury resulted from the negligence of the defendant, and no intimation that it was occasioned by any fault or neglect of the fireman. The court, therefore, by its charge, undertook to enlarge the issue, and to present to the jury a case not made by the pleadings. This was error. (*U. P. Rly. Co. v. Young*, 8 Kas. 658; *Price v. Railway Co.*, 72 Mo. 414; *Edens v. Railroad Co.*, 72 id. 212; *Waldhier v. Railroad Co.*, 71 id. 514; *Ely v. St. Louis & C. Rld. Co.*, 16 Am. and Eng. Rld. Cases, 342.)

Undoubtedly the company is liable for the negligence of the fireman as well as for that of the engineer, but the plaintiff cannot plead that the liability arose from the negligence of the engineer, and sustain his action by showing negligence in the fireman or in some other servant of the company. If the proof disclosed that the injury was occasioned by the negligence of the fireman, or through some joint fault of the engineer and the fireman, the plaintiff might, under the liberal provisions of the code, have obtained leave to amend his petition. But in that case the defendant would have been entitled to a continuance, as it could not be compelled to enter at once upon the trial of a wholly different issue than that which had been formed by the pleadings. The defendant had a right to assume that it would not be called upon to meet any issue of negligence in the fireman, and may have gone there entirely unprepared to try that question. But the plaintiff made no application to amend, and no amendment was made. If the evidence indisputably showed that the injury was caused by the negligence of the engineer, and not through any fault of the fireman, we might hold the instruction to be harmless, but such is not the case. The evidence is conflicting with regard to the fault of the engineer, and there was incidentally brought into the testimony some proof tending to show negligence in the fireman. In view of this condition of the evidence, we are unable to say that the directions given by the court that

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the defendant might be held liable for the negligence of the fireman did not mislead the jury, and we must therefore reverse the judgment, and remand the cause for a new trial.

All the Justices concurring.

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39 333

H. S. INGRAHAM V. GEORGE A. MORRIS.

1. *CONTRACT, Construed.* An allegation that the "plaintiff contracted with the defendant to cut and bind wheat for the defendant," is not an allegation that the plaintiff contracted with the defendant to cut and bind *all* the wheat which the defendant owned.
2. *VERDICT, Not Set Aside.* Where the evidence is conflicting upon a given subject, but sufficient to sustain the verdict of the jury, the supreme court cannot set aside such verdict.

Error from Wyandotte District Court.

THE opinion states the case. Trial at the December Term, 1884, and judgment for plaintiff *Morris*. The defendant *Ingraham* brings the case here.

W. C. Stewart, for plaintiff in error.

Stevens & Stevens, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by George A. Morris before a justice of the peace of Wyandotte county, against H. S. Ingraham, for work and labor in cutting and binding wheat. Judgment was rendered in favor of the plaintiff and against the defendant, and the defendant appealed to the district court, where the case was tried before the court and a jury, and a verdict and judgment were rendered in favor of the plaintiff and against the defendant for \$54.50. The defendant brings the case to this court.

The plaintiff in error, defendant below, alleges two principal

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grounds for reversal of the judgment of the court below: First, that the plaintiff below did not prove the cause of action which he set forth in his bill of particulars; second, that he did not prove any cause of action. The plaintiff alleged in his bill of particulars, among other things, as follows:

"That sometime in the month of April, 1884, plaintiff contracted with the defendant to cut and bind wheat for the defendant, for which the defendant was to pay the plaintiff at the rate of \$1.50 per acre; that in pursuance to said agreement plaintiff cut and bound 38 acres, amounting to \$57, which defendant refused to pay."

The evidence on the trial showed that the defendant had about $56\frac{1}{2}$ acres of wheat, in three separate pieces; that the plaintiff cut and bound two of such pieces, or $36\frac{1}{2}$ acres, and did not cut or bind the other piece, which contained about twenty acres. The plaintiff in error, defendant below, now claims that the plaintiff alleged in his bill of particulars in effect that he agreed to cut and bind *all* the defendant's wheat, while his proof introduced on the trial showed that he agreed to cut and bind just twenty acres of such wheat, and no more, and therefore he claims that there was a variance between the plaintiff's allegations and his proof, and therefore that he cannot recover. We perceive no such variance. The plain-

1. Contract
construed.
tiff *did not allege* that he agreed to cut and bind *all* the defendant's wheat, but simply alleged that he "contracted with the defendant to cut and bind wheat for defendant," without alleging any amount; and the evidence not only proved that the plaintiff agreed "to cut and bind wheat for the defendant," but also proved that he did in fact cut and bind the same. The allegation that the "plaintiff contracted with the defendant to cut and bind wheat for the defendant," is not an allegation that the plaintiff contracted to cut and bind *all* the wheat which the defendant owned. In our opinion, there is clearly no variance between the plaintiff's allegations and his proof.

The plaintiff in error, defendant below, further claims that the plaintiff below did not prove any cause of action; and this claim is founded upon the theory that the plaintiff agreed to

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cut and bind *all* the defendant's wheat, but failed to do so. The question as to what the plaintiff agreed to do is a question of fact, which was submitted to the jury upon the evidence, and the jury found against the defendant and in favor of the plaintiff, and the court below sustained the verdict of the jury. And while the evidence was conflicting and contradictory, and possibly the preponderance thereof in favor of the defendant, yet we think there was sufficient evidence to sustain the verdict of the jury, and hence their verdict must be sustained. The plaintiff himself testified that he did not agree to cut and bind all the defendant's wheat; that he refused to make any such agreement; and refused particularly to agree to cut and bind the twenty-acre piece. Indeed, he testified that he did not agree to cut and bind more than twenty acres, but that he did in fact cut and bind 36½ acres.

The judgment of the court below will be affirmed.

All the Justices concurring.

35 299
55 347

RAY SANBORN, *an infant, by his next friend, Charlotte Sanborn*, v. THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY.

1. RAILROAD MACHINERY — *Company not Culpably Negligent.* Where, in an action against a railroad company to recover damages for personal injury received by an employé in attempting to oil an iron punch driven by iron cog-wheels, which are six or seven feet from the ground or floor of the machine shop, the evidence offered shows that it is not usual to box or fence such machinery, and that the machinery is so arranged with a tight and loose pulley that if a person is going to oil or repair it he can immediately stop the same by simply throwing the belt upon the loose pulley, *held*, that the failure or negligence to box or fence such cog-wheels is not of itself culpable negligence on the part of the company.
2. ——— *Avoidance of Danger; Presumption.* A young man of the age of seventeen years and seven months is presumed to have suf-

Statement of the Case.

ficient capacity to be sensible of danger, and to have the power to avoid it; and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age.

Error from Shawnee District Court.

ON February 17, 1883, *Ray Sanborn*, an infant, who sues by his next friend, *Charlotte Sanborn*, commenced his action against *The Atchison, Topeka & Santa Fé Railroad Company* to recover damages, and in his petition alleged:

"That on the 19th day of February, 1881, and prior thereto, the defendant had been, was, and is the owner of and operating a railroad in Shawnee county, Kansas, and certain machinery connected with its said road, situate at the city of Topeka, in said county, among, or a part of which it owned and operated a certain 'iron punch,' run and operated by steam, by said defendant as aforesaid; that plaintiff was at the time of the grievances hereinafter stated in the employment of the defendant, and hired to serve said defendant in and about said machinery, and was of tender years, to wit, seventeen years of age, and ignorant and unskilled in operating and working such machinery; and was on said date in the employment of said defendant, under the charge and direction of H. S. Benton, the foreman, in operating said machinery as agent, and in the employment of said defendant, and as such authorized and empowered by said defendant to operate said machinery, and to govern and control the men and other employes, including plaintiff, in the employment of said defendant, then and there being; that said defendant, by its foreman and employé, well knowing that plaintiff was unskilled and ignorant in operating said machinery, negligently ordered and directed plaintiff to oil and lubricate parts of certain cogs belonging to said machinery employed in operating said iron punch, as aforesaid, which said cogs were by the negligence and mismanagement of said defendant and its employes left in an exposed, unprotected and dangerous condition; and the said plaintiff, in obedience to said order of said Benton on said date, using ordinary skill and judgment, and without any fault and neglect, whilst in the act of supplying the cup of said cogs had his right hand and arm caught by and between said cogs and then and there crushed, mutilated and wounded in such a manner as to, and he did, suffer amputation of said arm below the elbow, and which said accident was caused by the negligence

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and mismanagement of defendant and its employés by not then and there having said cogs boxed up and covered and protected as the same should and could have been, and by not having the said machinery otherwise properly constructed and adjusted as defendant was required to do; and in consequence of the said negligence and mismanagement of said defendant and its agents and employés, plaintiff has become and is rendered a permanent cripple; and in consequence of said injury plaintiff became sick, sore and disordered, and so remained for a long space of time, to wit, three months, during all of which time plaintiff suffered and endured great pain, and thereby plaintiff was forced to and did then and there lay out large sums of money, amounting in the whole to two hundred dollars, in and about being ministered to and treated in said sickness, lameness and disorder, and also thereby plaintiff incurred other and further divers expenses, damages and injuries, all and total amounting to the great sum of ten thousand dollars, for which plaintiff asks judgment, costs, and other relief as by law in such cases provided."

On March 13, 1883, the company filed the following answer, omitting court and title:

"Now comes the defendant, and for answer to the petition of plaintiff in the above-entitled cause—

"1. Denies each and every material allegation therein contained.

"2. For a second and further defense, the defendant says that the injuries, if any, received by said plaintiff were occasioned wholly by his negligence (gross), and without fault of the said defendant, its agents or servants.

"3. For a third and further defense, defendant says that the injuries, if any, received by said plaintiff were occasioned wholly by the negligence of said plaintiff, or his coemployés and fellow-servants, and without fault of the said defendant.

"Wherefore, said defendant prays judgment for costs."

On April 4, 1883, the plaintiff moved the court to strike out the second and third paragraphs of the answer of defendant, which motion, upon the hearing thereof, was overruled. Subsequently, the plaintiff filed a reply to the second and third paragraphs of the answer. Trial at the January Term, 1884. Upon the conclusion of plaintiff's evidence, the defendant interposed a demurrer thereto, which was sustained

Opinion of the Court.

by the court and the jury discharged. Plaintiff thereupon filed a motion for a new trial, which, upon hearing, was overruled. Plaintiff excepted to the rulings of the court upon the demurrer to the evidence and the motion for a new trial, and brings the case here.

H. P. Vrooman, and *Jetmore & Son*, for plaintiff in error.

A. A. Hurd, *C. N. Sterry*, and *W. C. Campbell*, for defendant in error; *Geo. W. McCrary*, general counsel.

The opinion of the court was delivered by

HORTON, C. J.: Action by Ray Sanborn, by his next friend, for a personal injury. The petition alleged that Ray Sanborn was ordered by H. S. Benton, the foreman of the boiler shop of the railroad company, at Topeka, to oil and lubricate parts of certain cogs belonging to or running an iron punch in the shop of the company; that whilst in the act of supplying the cup of the cogs with oil, his right hand and arm were caught by and between the cogs and so mutilated that amputation of the arm below the elbow was necessary; that the accident was caused by the negligence and mismanagement of the company in not having the cogs boxed up and protected as the same should and could have been, and in not having the machine otherwise properly constructed and adjusted as the company was required to do. There is no evidence in the record tending to show that the company was guilty of any negligence in failing to cover or further protect the cogs of the wheels where Sanborn was injured, and no evidence whatever tending to show that the iron punch and all the machinery connected therewith was not properly constructed and adjusted.

John M. Stebbins, a witness called by the plaintiff, among other things testified that—

“He was a boiler-maker by trade, and had worked in that business for forty years; that at the time of the injury complained of he was working as a mechanic in the boiler shop of the railroad company at Topeka, and had been working in the shop for that company about fifteen months; that he knew of the accident very soon afterwards, but did not see it; that

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there were two punches somewhat similar in the shop—a heavier punch and a lighter punch; that anybody in the shop who desired could use the small punch; that it was used for general purposes, like punching $\frac{1}{4}$ -inch, $\frac{5}{16}$, $\frac{1}{2}$ -inch and $\frac{3}{8}$ holes; that the pinion wheel was between five and six feet from the floor; that a shaft driving the punch runs across near the top of the machine; that right in the rear of the pinion wheel is a journal, with a cup on it; that in the top there is a recess where oil is put and holes to let the oil down to the journal; that to put the oil in you have to put it into the oil-holes; that Sanborn could have oiled the machine from the ground, but by getting on a box that was there, he was able to reach more easily where the oil box was; that if he had used his left hand there would have been no danger; that he had operated other machines propelled with wheels and cogs like the iron punch; that he had had experience with such machines—as much as any ordinary man that works in the business; that there was no way in which a person could be caught and injured in the wheel when standing in front of the punch; that a person could oil it just as easy that way; that if a person would get something to stand on in front he would be perfectly safe; that where the belt runs a double wheel comes up; that there is a tight and loose pulley with the machine; that when the belt is on the loose pulley it does not run the machine; that by using the ‘shifter’ a person can put the belt onto the tight or loose pulley; that a person standing in front could stop the machine; that a person standing up on a box for the purpose of oiling on top could reach up and shove the ‘shifter’ and stop the machine; that a person could stop the machine to oil it, but this was not the usual method; that before the accident there was no ordinary mode of protecting the machinery.”

Joseph Heslett, called by the plaintiff as a witness, testified:

“That he is a machinist, and had been among machines all his life; that he was acquainted with the iron punch where the accident happened, and was acquainted with the construction of machines similar to that one; that he was in the machine shop when Sanborn was hurt, but about 400 yards away; that there was no necessity for protecting such machinery; that when such machinery is down on the floor, or working on the floor, it is usual to protect it, but when it is five or six feet from the ground, it is not protected; that it is not usual or customary to fence or box machinery that is six or seven feet

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from the ground; that he put the machine up, and that there is a 'shifter' and a tight and loose pulley; that if a person was going to oil the machine, he would simply throw the belt onto the loose pulley and the machine would immediately stop; that if anyone wanted to repair the machine, that is the proper method to stop it, and that is what the loose pulley is put there for; that it was the orders before the accident occurred to stop the machine to oil it; that he had seen the machine oiled without being stopped, and he had seen the machine stopped for the purpose of being oiled; that the orders were positive to stop the machine when cleaning and oiling."

John Mangan, called as a witness for the plaintiff, testified:

"That he was a boiler-maker, and had worked for twenty-eight years in that business, and in nearly half of the machine shops of the United States; that he was acquainted with the iron punch and the machinery where the accident occurred; that he was at work for the railroad company in its boiler shop in Topeka at the time; that prior to the accident there was no ordinary way of protecting such machinery by boxing or fencing to prevent accidents; that he never saw a machine of the kind that injured Sanborn boxed before the accident."

Sanborn himself testified:

"That he had been at work as a helper in the boiler shop for a year and ten months; that in the room in which he worked were five machines—two punches, one planer, and two drills; that two of them, the large punch and drill, had been there during all of his service; that the smaller punch, on which he was injured, had been there for about five months; that he knew how the punch was started and stopped; that there were two pulleys, and the belt was shifted from the main pulley onto the loose pulley by a shifter; that he saw others do it; that he had seen other men oil the machine as he was doing; that they never got hurt, and that he oiled it in the usual and customary way in which he had seen others oil it."

At the time of the accident, Sanborn was in possession of all his faculties and all his senses. The two cog-wheels were about six feet from the ground or floor, and there was nothing to prevent him from seeing that the cogs were not boxed or fenced, and every act that directly contributed to bring about the injury was his own. Of course he did not intend to get injured. He did not intend to have his hand caught between

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the cogs where it was crushed, but accidentally his hand got low enough down to be caught, and thus his injury occurred. For this accidental injury he is not entitled to compensation from the company. (*A. T. & S. F. Rld. Co. v. Plunkett*, 25 Kas. 188; *Railroad Co. v. Smithson*, 45 Mich. 212; *Sullivan v. Manufacturing Co.*, 113 Mass. 396.)

It is said, however, that Benton, the foreman of the defendant's shop, ordered Sanborn to run the punch and to oil the machinery; that he was an infant of tender years, ignorant and uninformed, and therefore this was such negligence that he is entitled to recover damages. As there is no direct allegation in the petition that this caused the injury complained of, it is doubtful whether the question sought to be presented is in the case. If it were a matter for our determination,

1. Railroad company not culpably negligent.

we do not think any culpable negligence is shown on the part of the company or its foreman. At

the time of the accident plaintiff was seventeen years and seven months of age. He was not, therefore, in law, an infant of tender years. In this state, if a minor be over fourteen years of age and of sound intellect, he may select his own guardian. In this state, a person over sixteen years of age convicted of any felony or other offense must suffer the punishment prescribed by the statute to the same extent as if he had reached majority. We therefore think it may be presumed that a

2. Avoidance of danger; presumption.

person of the age of Sanborn at the time he was injured, has sufficient capacity to be sensible of danger and to have the power to avoid it, and that

this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age. (*Nagle v. Railroad Co.*, 88 Pa. St. 35.) There was no evidence offered tending to show that Sanborn was limited in his mental capacity, or was in any way feeble-minded. We fully recognize the doctrine that it may be negligence to set an infant of tender years to work upon a dangerous machine without pointing out its dangers, but considering the age of the injured party and the length of time he had worked in the shop of the rail-

Westbrook v. Mize.

road company before being hurt, the case presented does not come within that rule.

It is unnecessary in this case to decide whether the plaintiff had the right to prove that the company, subsequent to the accident, boxed up or inclosed the machinery inflicting the injury. Even if the ruling was erroneous, it was immaterial upon the facts disclosed, and therefore not prejudicial. The most that can be said in that matter is, that the company, as a measure of extreme caution, adopted additional safeguards as to such machinery after the unexpected accident had occurred to Sanborn. The declarations of Benton, the foreman, subsequent to the accident, were not parts of the *res gestæ*, and ought not to have been received in evidence. (*K. P. Rly. Co. v. Pointer*, 9 Kas. 620; *Luby v. Railroad Co.*, 17 N. Y. 131; *Sweatland v. Telegraph Co.*, 27 Iowa, 433.)

Upon the facts testified to, the trial court committed no error in sustaining the demurrer to the evidence. Therefore the judgment of the district court must be affirmed.

All the Justices concurring.

C. E. WESTBROOK V. J. S. MIZE.

1. **JOINT INJURY; Liability; Satisfaction; Bar.** Where several persons jointly commit an injury, the liability is joint and several, and the party injured may sue all of them in a single action, or he may sue them separately at the same time; but although several judgments may thus be obtained, there can be but one satisfaction, and the acceptance of payment in full upon the judgment obtained against one of such persons will operate as a bar to the further prosecution of actions for the same injury against any of the others.
2. **PLEADING — Damages — Measure of Recovery.** Although several separate suits may be brought for a joint liability, yet where the injury is an entirety, the damages resulting therefrom cannot be apportioned among the wrongdoers nor divided into separate demands; and where the injured party sues one of the wrongdoers and demands only a

35	299
58	728
53	438
35	299
d56	718
35	299
59	361
35	299
79	142
d79	147
35	299
82	45

Westbrook v. Mize.

part of the damages which he suffered by the injury, a recovery and satisfaction therein will operate as a bar to any further claim of damages against the others.

3. *Costs, How Taxed.* In such a case, where separate suits are instituted against the wrongdoers, the plaintiff is entitled to the costs which had accrued in all of the cases up to the time when satisfaction is made in any one of them, but the defendants are entitled to recover the costs that may subsequently accrue in the other cases.

Error from Marion District Court.

THE opinion states the nature of the action and the facts. At the February Term, 1884, the court, upon the motion of the defendant *Mize*, rendered judgment against the plaintiff upon the pleadings in the cause. This ruling plaintiff brings here for review.

Doster & Bogle, for plaintiff in error.

J. Ware Butterfield, and *Scott & Lynn*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This is an action for the conversion of a quantity of hay belonging to the plaintiff. After the plaintiff's reply had been filed, the court, upon motion of the defendant, rendered judgment against the plaintiff upon the pleadings in the cause, and this is the ruling complained of here. The only question for our decision, then, arises upon the interpretation and effect of the pleadings. It was alleged in the petition that on November 14, 1882, the defendant, J. S. Mize, wrongfully carried away and converted to his own use sixty tons of hay belonging to the plaintiff, which was of the value of \$3 per ton. The defendant answered that the hay was seized as the property of one Henry J. Tucker, under an attachment issued in an action brought by C. F. Brandner against the said Tucker, in which action a judgment was rendered in favor of Brandner, and the attached hay was ordered to be sold as the property of Tucker to satisfy the judgment. In pursuance of that order and the direction of Brandner, the defendant advertised for sale the sixty tons of hay of which

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he had possession, and on November 9, 1882, sold the same to Brandner; but when the hay came to be delivered to the purchaser on November 14, 1882, there remained but about thirteen tons thereof. The remainder of it, as was alleged, had been hauled away and used by Westbrook, the plaintiff in this action. As a further defense, the defendant alleged that on November 14, 1882, C. E. Westbrook began an action against Brandner to recover for thirty tons of hay of the alleged value of \$3 per ton, claimed by Westbrook to have been wrongfully carried away by Brandner, and which was the same hay in controversy in this action; that the cause was tried on March 7, 1883, and resulted in a judgment in favor of Westbrook and against Brandner for the sum of \$81, damages, with interest from the 14th day of November, 1882, and the costs of suit; that on April 14th, 1883, Brandner paid that judgment in full, and on April 17th, 1883, the amount thereof was accepted and receipted for by the plaintiff Westbrook. The plaintiff replied that the hay mentioned in defendant's answer was, at the time of the pretended levy and sale thereof by the defendant in his capacity as constable, the property of the plaintiff, of which fact he had full knowledge when the levy and sale were made, and he averred that the defendant and C. F. Brandner, who also knew that the hay was the property of the plaintiff, colluded together for the purpose of injuring the plaintiff and depriving him of his property, and so colluding together, caused the levy and sale of the hay as the property of Henry J. Tucker. In further reply to the answer of the defendant, the plaintiff alleged that the judgment mentioned in his answer against said C. F. Brandner was rendered "under chapter 113 of the Compiled Laws of 1879, for treble the actual damages sustained by said plaintiff on account of the wrongful act of said Brandner in carrying away from section one, township twenty-two, range four, in Marion county, nine tons of hay in controversy in this suit, and no more, the same being only a portion of the hay which said Brandner and said defendant had, as hereinbefore alleged, wrongfully levied upon and sold and converted to

their own use, and by reason of said fact, was not a payment for the full amount of damages which the said plaintiff sustained by the wrongful and tortious act of the said Brandner and said defendant."

We are of opinion that the acts of the plaintiff, as stated and admitted in the foregoing pleadings barred the further prosecution of his suit. By his reply it appears that the defendant and C. F. Brandner conspired together to wrongfully deprive the plaintiff of his property. The tortious taking of the sixty tons of hay was the joint action of both Brandner and the defendant. It being a joint wrong, either or both of the parties were liable to the full extent of the injury, as the law holds any one of such joint trespassers responsible for the misconduct of all. The plaintiff was therefore at liberty to sue them jointly, or to bring separate actions against each,

but he can only have one satisfaction for such injury. The bringing of a suit against Brandner would not bar the institution of a separate suit against the constable, but if a recovery was had in the case against Brandner for the joint liability, the satisfaction of that judgment would preclude the further prosecution of the action against the constable. That is the case made by the pleadings. The present action was brought on the 12th day of March, 1883; and in the reply filed by the plaintiff, he admits that on November 14, 1882, he sued Brandner for taking and carrying away a portion of the hay in controversy in this action, and obtained a judgment therein which has been fully satisfied. That the hay involved in that suit is the same for which a recovery is sought in this action, is quite clearly stated. He first charges that the defendant and Brandner wrongfully converted sixty tons of hay by the unlawful levy and sale thereof as the property of Tucker, and then states that the judgment which he recovered against Brandner in the former action was for "nine tons of hay in controversy in this suit," "the same being only a portion of the hay which said Brandner and said defendant had, as hereinbefore alleged, wrongfully levied upon and sold, and converted to their own

1. Joint injury;
liability; satisfaction; bar.

Opinion of the Court.

use;" and then he follows with the statement that the amount of recovery in that action "was not a payment for the full amount of damages the said plaintiff sustained by the wrongful and tortious act of said Brandner and said defendant." It is thus seen that the wrongful taking charged against Brandner, for which a recovery and satisfaction has been had, is embraced in the joint injury committed by the defendant and Brandner. It is now claimed by the plaintiff that as the recovery against Brandner was for but nine tons of the hay, a separate action can be maintained against him for the injury done by his co-trespasser, providing the damage done by one can be ascertained and separated from that committed by the other. The responsibility cannot thus be apportioned. The entire quantity of the hay was levied upon under a single attachment and sold at a single sale in pursuance of the alleged conspiracy between Brandner and the defendant. The levy and sale under the circumstances alleged constituted a single tortious act, and the injury thus jointly committed is an entirety. It is immaterial who removed and used the hay, or whether nine tons were actually used by Brandner and the other fifty-one by Mize, because, being a joint trespass, each is responsible for the whole, and a release of one is a release of all. From the pleadings it appears that the injury inflicted, and the claim of damages therefor, constituted a single and entire demand, which the law does not permit to be severed or divided up into several causes of action. If in the former action the plaintiff demanded less than he was entitled to, or if he sued for all and recovered less, he will not be permitted after the payment and acceptance of the amount recovered, to maintain an action against the other trespasser for the balance to which he was entitled, or which he might have demanded in the first instance. (*Turner v. Hitchcock*, 20 Iowa, 310; *Cooley on Torts*, 133, *et seq.*; and cases cited.)

Nor will it avail the defendant that the former action was brought under chapter 113 of the General Statutes. Under the averments of the plaintiff in the present action, both

2. Pleading;
damages; measure
of recovery.

Dolan, *Sheriff*, v. Van Demark.

Brandner and the defendant might have been proceeded against in the action brought under that statute. In that action the plaintiff could have recovered treble the value of the hay taken and carried away, which is all and more than all sought to be recovered in this action. It is immaterial which remedy he pursues; he had but a single demand, and can only have a single satisfaction. Either remedy was open to him, and having elected to pursue the special statutory remedy, the other is not now available.

The assessment of all the costs against the plaintiff was, however, erroneous. The judgment in the first action was not paid until April 14, 1883, and the present suit was begun on March 12, 1883, and the answer therein was filed on April 6, 1883. The plaintiff, as we have seen, had a right to bring and maintain separate suits against each of the wrongdoers at the same time, and therefore had a right to recover all costs in both suits up to the time when satisfaction was made in either one. The plaintiff was therefore entitled to recover the costs which had accrued in this action until the judgment in the first action was fully satisfied, while all costs which subsequently accrued should be assessed against the plaintiff.

The judgment will be so modified, and the costs in this court will be divided.

All the Justices concurring.

35	304
38	706
35	304
47	86
35	304
49	747
35	304
68	152
68	302

THOMAS M. DOLAN, *as Sheriff of Washington County*, v.
C. W. VAN DEMARK.

1. ATTORNEY AT LAW; *Authority; Presumption.* An attorney at law and banker, having claims in his hands for collection, will, where it is necessary to secure the collection of such claims, presumptively have authority to take as collateral security and in his own name a promissory note secured by a chattel mortgage.

Opinion of the Court.

2. **CHATTEL MORTGAGE; *Validity; Possession.*** Where a mortgagee of chattels takes possession of the same under the terms of the mortgage and with the consent of the mortgagor, the mortgage will be held valid, although it may never have been filed in the office of the register of deeds, and although the description of the property in the mortgage may be slightly defective; and *held*, in the present case, that there was sufficient evidence to sustain the finding made by the trial court that the mortgagee took the actual possession of the mortgaged property under the mortgage.
3. **VENDOR AND VENDEE; *Fraud; Sale — When Valid, When Not.*** While generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a preëxisting debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as a security for such debt, and whether such creditor has notice or not of the prior fraudulent sale.
4. ———, ***Pleading; Damages.*** In an action of replevin brought by a mortgagee of chattels, where the property remains in the hands of the defendant, and is sold by the defendant for more than the plaintiff's claim, with interest, and judgment is rendered in favor of the plaintiff, but only for his damages, and not for a return of the property, *held*, that he may recover as his damages the amount of his claim, with interest, although the petition was only an ordinary petition in replevin.

Error from Washington District Court.

REPLEVIN by *Van Demark* against *Dolan*, as sheriff of Washington county. Trial at the February Term, 1884, and judgment for plaintiff. The defendant brings the case here. The material facts appear in the opinion.

J. W. Chadwick, for plaintiff in error.

J. W. Rector, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin, brought by C. W. Van Demark against Thomas M. Dolan, to recover

Dolan, Sheriff, v. Van Demark.

certain goods and merchandise. The action was tried by the court, without a jury, and judgment was rendered in favor of the plaintiff and against the defendant; and the defendant, as plaintiff in error, brings the case to this court. The facts of the case seem to be substantially as follows: On March 19, 1883, Henry H. Bradley owned the property in controversy, which, with other goods and merchandise, constituted his stock in trade as a merchant at Brantford, in Washington county. On that day he sold all the foregoing goods and merchandise to George Brabb, but this sale was made with the intention of hindering, delaying and defrauding his creditors, and was therefore void as against such creditors. On March 28, Thomas M. Dolan, who was then the sheriff of Washington county, levied an attachment upon a small portion of the goods. That levy is admitted to be valid, and really has nothing to do with this case. Afterward, but on the same day, Van Demark, who was an attorney at law and banker at Clyde, Cloud county, Kansas, and who held four separate claims of four different creditors of Bradley, went to Brantford and to Bradley and demanded payment of such claims; but Bradley stated that he could not pay the same, but agreed to and did indorse and deliver to Van Demark, as collateral security therefor, a promissory note for \$2,000, dated March 19, 1883, given by Brabb to Bradley as part consideration for the goods sold by Bradley to Brabb, and Brabb, with the consent of Bradley and in his presence, gave a chattel mortgage on the goods to secure the promissory note. Neither this chattel mortgage nor a copy thereof has ever been filed in the office of the register of deeds. Van Demark at the time had knowledge of the fraudulent character of the sale of the goods from Bradley to Brabb. Van Demark claims that he immediately took possession of the goods, with the consent of Bradley and Brabb, with the knowledge of Dolan, and without objection from anyone, but Dolan claims that Van Demark never did take or have the possession of the goods. The question of Van Demark's possession is the principal disputed question of fact in the case. Afterward, but on the same day, a con-

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stable levied an attachment on a portion of the goods, but whether that levy is valid, or not, is immaterial in this case. Afterward, and on the same day, the sheriff levied three other attachments upon the remaining goods, the property in controversy in this case, and took possession of the same, and afterward, and on three other days, levied four other attachments upon the same goods. Afterward, and on May 4, 1883, Van Demark commenced this action for the recovery of the goods. On the trial it appeared that the sheriff had sold the goods for the sum of \$3,089, which was admitted to be their fair value. The court also found that the claims held by Van Demark, with interest, amounted to \$1,424.15, and for this amount rendered judgment in favor of Van Demark and against Dolan.

Dolan, the plaintiff in error, defendant below, sets forth nine assignments of error. We shall not discuss them separately, nor any of them in detail, except the principal ones; but all must be overruled.

The plaintiff, Van Demark, was an attorney at law and banker, and held the aforesaid claims against Brádley for collection; and by virtue of his authority as collecting agent, we think that presumptively he had a right to do whatever was best for his clients or customers to secure their collection. (*Ryan v. Tudor*, 31 Kas. 366; 1 Wait's Actions and Defenses, 221, *et seq.*, and cases there cited.) And what he did for his clients or customers was in all probability the very best thing that could have been done for them, and was in fact necessary. But whether it was best and necessary, or not, is not a question for third parties to raise. As against Dolan and the persons whom he represents, we think that Van Demark, as the agent of the owners of the claims, had a right to do all that he has done in the present case.

It is claimed, however, by the plaintiff in error, defendant below, that the chattel mortgage is void for the reason that it was never filed in the office of the register of deeds, and also for uncertainty in the description of the mortgaged property.

1. Attorney at law; authority; presumption.

Dolan, Sheriff, v. Van Demark.

The description was probably sufficient; but even if slightly defective, still, neither this objection nor the one that the chattel mortgage had never been filed amounts to anything, if

2. Chattel mortgage; validity; possession.

Van Demark really and in fact obtained the actual possession of the property before the attachments were levied under which the defendant, Dolan, took final possession of the property. (*Cameron v. Marvin*, 26 Kas. 612, 625, *et seq.*, and cases there cited; *Jones on Chattel Mortgages*, § 178; *Herman on Chattel Mortgages*, § 38.) And the court below specifically found that Van Demark did so take and have the possession of the property. It is claimed, however, that this finding is erroneous. This finding, however, is one of fact, founded upon the evidence, and the evidence was all in parol; and if there was sufficient evidence from which the court could have made the finding, the finding must be sustained. Now we think there was such evidence. Van Demark testified that he took possession of the property, and that whatever he did with reference thereto was done with the consent of Bradley and Brabb, and with the knowledge of the defendant, Dolan, and without any objection from any person. They were all present in the building where the goods were kept, and Van Demark announced that he took the possession of the goods, and turned the key in the front door, and claimed to have the possession thereof. He did not, however, remove the goods, nor did he have time to remove them before the defendant, Dolan, levied the attachments upon them and took the possession thereof; nor did he obtain the keys to the building. The keys at the time were in the possession of Bradley, who finally delivered them to Dolan, after he took the possession of the goods under the attachments. We think the evidence is sufficient to sustain the finding of the court below, or at least we cannot say that the evidence is not sufficient to sustain such finding. The mortgagee in the present case had a right to take the possession of the property whenever he deemed himself insecure, and undoubtedly there were ample grounds to authorize an honest belief of insecurity. Besides,

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Brabb and Bradley were willing that he should take the possession of the property.

The fact that the mortgage was executed by Brabb instead of by Bradley after the goods had been fraudulently sold by Bradley to Brabb, and the fact that Van Demark had notice of the fraudulent intentions of Brabb and Bradley at the time

of the sale, cannot render the mortgage void or voidable. While generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a preëxisting debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. (*Butler v. White*, 25 Minn. 432; *Boyd v. Brown*, 34 Mass. 453; *Murphy v. Moore*, 30 Hun, 95; *Stark v. Ward*, 3 Pa. St. 328; *Webb v. Brown*, 3 Ohio St. 246; Bump on Fraudulent Conveyances, 3d ed., 499, 500.) The fraudulent vendee may lawfully dispose of the property in any manner in which the fraudulent vendor himself might have disposed of the property if the fraudulent sale had not occurred.

This was an action of replevin. The plaintiff's interest in the property was the amount of the claims which he held against Bradley, with interest; and it was not error for the court below

to render judgment in favor of the plaintiff and against the defendant for the amount of such claims, with interest. No judgment was rendered for a return of the property, and the amount of the proceeds of the sale of the property was more than enough to satisfy said claims with interest. The cases of *Green v. Dunn*, 5 Kas.

3. Vendor and vendee; fraud; sale — when valid, when not.

4. Pleading; recovery of damages.

Symns & Co. v. Schotten & Co.

254, and *Shepard v. Pratt*, 16 id. 209, cited by counsel for plaintiff in error, have no application to this case. The plaintiff in error, defendant below, claims, however, that the aggregate amount of the claims, with interest, is only \$1,415.60, or \$8.55 less than the amount for which the court below rendered judgment. This claim we think is correct, and the judgment of the court below will therefore be modified accordingly; in all other respects the judgment of the court below will be affirmed.

All the Justices concurring.

A. B. SYMNS & Co. v. WM. SCHOTTEN & Co.

1. **STOPPAGE, in Transitu.** The vendor's right of stoppage *in transitu* continues not only while the goods are being carried to the point of destination, but also until they have actually reached the possession of the vendee.
2. **IMPLICATION — Goods in Transit.** Where the goods are removed by the railroad company and placed in its warehouse in its capacity as carrier to await payment of the freight charges and a delivery to the vendee, the implication of the law is, that the goods are still in transit and subject to the vendor's right of stoppage.

Error from Lyon District Court.

ACTION begun by A. B. Symns & Co. to recover from the Emporia Mercantile Association \$185.05, for merchandise sold and delivered to the defendant. At the same time the plaintiff caused an attachment to be issued and levied upon certain goods which were found in the possession of the A. T. & S. F. Rld. Co., and which had been shipped to the defendant over its road. Afterward, *Wm. Schotten & Co.* intervened in the action, claiming that the attached goods were purchased from them by the Emporia Mercantile Association on credit, and that after they were shipped and before delivery, the de-

Statement of the Case.

fendant became insolvent. Notice of these facts was given to the railroad company, and they demanded the goods under the right of stoppage *in transitu*. By reason of the notice and demand, Wm. Schotten & Co. claimed the goods, while the plaintiff claimed them under the attachment proceedings. Default was made by the Mercantile Association, and the cause was tried between the other parties, upon the following agreed statement of facts:

"It is hereby stipulated and agreed between plaintiffs and Wm. Schotten & Co. that the following are the facts in this case, so far as these two parties are concerned:

"1. Both said parties are copartners as alleged.

"2. The bill of goods in controversy, viz., 10 cases of coffee, 1-lb. packages, Philadelphia, \$155; 1 drum of keg Y pepper, Philadelphia, \$15; 10 lbs. hops, Philadelphia, \$3.50—\$173.50, were ordered by said defendant, the Emporia Mercantile Association, just previous to October 16, 1883, of Wm. Schotten & Co., and on October 16, 1883, sold by Wm. Schotten & Co. on said order to said association, and by Wm. Schotten & Co., who then were and now are wholesale merchants at St. Louis, Mo., shipped by railroad and common carriers from the city of St. Louis, to the city of Emporia, Lyon county, Kansas, consigned to said association there, a corporation doing a retail grocery business at Emporia, aforesaid. The Atchison, Topeka & Santa Fé Railroad Company was and is a common carrier for the last and western part of the lines of railroad over which said goods were shipped. Said goods arrived at the depot of the A. T. & S. F. Rld. Co. at Emporia on October 22, 1883. They were unloaded and taken out of the cars in which they came and were placed in the warehouse of the railroad company, and on October 23, 1883, the attachment in this suit was issued and the notice of garnishment issued and both served on the same day.

"3. The A. T. & S. F. Rld. Co. declined to recognize the attachment, and refused to deliver possession of said goods to the sheriff, and never did part with the possession thereof until November 29, 1883, as appears in finding No. 6, except as shown by finding No. 9.

"4. On October 25, 1883, the agent of the A. T. & S. F. Rld. Co. notified Wm. Schotten & Co. of such suit, and closed the notice in these words: 'And we demand that you take such steps to enforce and protect your rights in said action as

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to you may seem proper.—R. E. TORRINGTON, Agt. A. T. & S. F. Rld.’

“5. On October 27, 1883, Wm. Schotten & Co. sent to their attorneys, Buck & Feighan, the bill attached to their answer, and directed them to claim the said goods, and pursuant to said instructions on November 1, 1883, Buck & Feighan, for Wm. Schotten & Co., found said goods in the warehouse of the A. T. & S. F. Rld. Co. at Emporia, Kansas, and then and there informed said company that said association had become insolvent, and had not paid for said goods, and that they claimed the goods by their right of stoppage *in transitu*, and then and there demanded said goods and warned said railroad company not to deliver them either to said association or the said sheriff, or anyone else.

“6. On November 29, 1883, all the parties hereto and said railroad company stipulated for sale of goods, the proceeds to be held in place of the goods, as appears by written stipulation on file herein, and said railroad company then and there delivered said goods to Thomas & Jones, who paid therefor \$152, and paid thereon railroad freight and charges \$8.88, leaving net proceeds in the sum of \$143.12, to be disposed of under said claims of the said A. B. Symns & Co. and Wm. Schotten & Co.

“7. Between the time of said sale and said attachment, said association became, and ever since has been, insolvent.

“8. No part of said bill of goods has ever been paid, and Wm. Schotten & Co. did not hear of said insolvency until after said goods were shipped and while *in transitu*.

“9. At the time of levy the sheriff went into the room where the goods were in the railroad warehouse, and sorted them over so as to identify them, and then levied on them, and for said plaintiffs tendered to the railroad company the freight charges, which were refused. Both the attachment and garnishment were in due form of law in all respects. The goods were never delivered to Emporia Mercantile Association, unless above facts show delivery.”

The court found, as conclusions of law—

“First, that said Wm. Schotten & Co. are entitled to said sum of money, \$143.12 by their right of stoppage *in transitu*, relieved of all claim or lien on account of said attachment and garnishment. Second, as a matter of fact and law, that there is now due from said defendant the Emporia Mercantile Association to said defendants Wm. Schotten & Co. the sum of \$253.20.”

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The court rendered judgment against the Mercantile Association for that sum, and also adjudged that the \$143.12, the net proceeds of the goods in controversy, be applied on the judgment. The plaintiffs excepted to the conclusions of law and to the judgment, and bring the case here.

Kellogg & Sedgwick, for plaintiffs in error.

Buck & Feighan, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J.: The only question to be decided in this case is, whether Wm. Schotten & Co., who interpleaded in the action, had a right, under the facts, to reclaim the goods which they had sold to the Emporia Mercantile Association. It is agreed that the goods were sold on credit, and that after the sale and before their arrival at the point of destination the consignee became insolvent. The right of the vendors to repossess themselves of the goods at any time while they were on the road and prior to their arrival at Emporia is conceded. But it is claimed that because the goods had reached the point to which they were shipped, and had been unloaded from the cars and placed in the warehouse of the railroad company, the transitus was at an end, and the vendors' right of stoppage was extinguished. The right of stoppage *in transitu* is not so limited an one as the plaintiffs would make it. It is one which the law favors, and is said to be founded upon the just principle that one man's property shall not be applied in payment of another man's debts, and the courts have been inclined to encourage rather than to restrict the exercise of the right. The general rule is that the vendor may resume

1. Stoppage in transitu.

possession of the goods at any time before they actually reach the possession of the vendee. This right continues in the vendor not only while the goods are being carried to the place of consignment, but may be exercised at any time until the delivery to the vendee or his agent has been completed. The unloading of the goods and the placing of them in the warehouse of the railroad company does not

necessarily terminate the transitus, nor put an end to the right of stoppage; so long as they remain in the hands of the carrier or middlemen as such, the right does not cease. There may be cases where the possession of the carrier or warehouseman, after the final destination is reached, will, owing to the agreement of the parties, or the special circumstances of the case, be regarded as the possession of the vendee, and so put an end to the vendor's right of stoppage. But where goods are consigned and shipped in the ordinary way, and the railroad company which brings them to the point of delivery, in performance of its duty as carrier, unloads and places the goods in its warehouse awaiting the payment of freight charges before delivery to the vendee, the presumption will be that the goods are still in transit, and that the right of stoppage yet remains in the vendor.

2. Implication;
goods in transit.

In an Ohio case quite analogous to the one at bar, certain goods that had been consigned and shipped in the usual way, were transferred by the railroad company to its warehouse at the station to which the goods were consigned, and near to which the vendee resided and did business, there to await the payment by him of the charges thereon as a condition precedent to their removal and delivery at his business house, and it was held that the transfer did not *ipso facto* constitute a delivery of possession to the vendee, but was to be regarded as a reasonable exercise of the duty by the carrier in the course of their transit, and as connected with the original employment of the company as agent of the vendor to transport and deliver, and therefore did not preclude the vendor's right of stoppage *in transitu*. It was recognized that in some instances the carrier or middleman might become the agent of the vendee and hold possession for the vendee, but it was said that such "agency will not be implied from the carrier's original employment, and can arise only by showing affirmatively some arrangement or understanding to that effect other than the general words of an ordinary consignment." (*Calahan v. Babcock*, 21 Ohio St. 281.)

There is no conflicting authority upon the question presented here, and no necessity for a review of the decided cases. Among

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many others which might be cited in support of the views expressed, we refer to the following: *Rucker v. Donovan*, 13 Kas. 251; *O'Neil v. Garrett*, 6 Iowa, 480; *Buckley v. Furnis*, 15 Wend. 137; *Covell v. Hitchcock*, 23 id. 611; *Harris v. Pratt*, 17 N. Y. 249; *Loeb v. Peters*, 63 Ala. 243; *Newhall v. Vargus*, 13 Me. 93; *Inslee v. Lane*, 57 N. H. 454; *Hoover v. Tibbitts*, 13 Wis. 79; *Atkins v. Colby*, 20 N. H. 155; *Blackman v. Pierce*, 23 Cal. 508.

The record of this case discloses nothing from which we might infer that the carrier was the agent of the vendee. The goods were sold and consigned in the ordinary course of business between merchants, and when they arrived at Emporia they were taken out of the cars by the railroad company and placed in its warehouse, and there held in its character as carrier to await the payment of charges and a delivery to the consignee. The railroad company had not delivered the goods to the vendee, and in that respect its duty as carrier was incomplete. The freight was never paid, nor have the goods ever reached the possession of the vendee. The transitus, therefore, had not terminated, and the vendor's right of stoppage continued notwithstanding the seizure made under the attachment sued out by the plaintiff. The cause was rightly decided by the district court, and its judgment will be affirmed.

All the Justices concurring.

JOSEPH T. WARD v. H. S. CLARK.

JUSTICE OF THE PEACE; Election to Fill Vacancy. The governor appointed the defendant, in August, 1885, to fill a vacancy in the office of justice of the peace of the city of Topeka. The plaintiff was voted for and claimed to have been elected to fill such vacancy at the general election held in November, 1885. *Held*, That the vacancy could not be filled by an election before the regular city election held in April, 1886, to which time the defendant was entitled to hold the office under the appointment of the governor, and until his successor then chosen had qualified.

35	315
40	474
35	315
52	7
35	315
63	514

Original Proceedings in Quo Warranto.

ACTION in the nature of *quo warranto*, brought in this court November 28, 1885, by *Joseph T. Ward* against *H. S. Clark*. The opinion, filed at the May, 1886, session of the court, states the material facts.

Joseph T. Ward, plaintiff, for himself.

Webb & Spencer, and *J. H. Dinkgrave*, for defendant.

The opinion of the court was delivered by

JOHNSTON, J.: This is an action in the nature of *quo warranto*, brought by *Joseph T. Ward* to try the title to the office of justice of the peace of the city of Topeka, which office, he alleges, has been usurped and is unlawfully held by the defendant, *H. S. Clark*. The case has been presented here upon the defendant's demurrer to the petition of the plaintiff. From the petition it appears that *J. M. Matheny* was elected to the office in question in April, 1885, and resigned it in August of that year. Immediately upon the resignation of *Matheny*, and more than thirty days preceding the general election in November, 1885, the defendant, *H. S. Clark*, was appointed by the governor to fill the vacancy caused by such resignation. At the general election held on November 3, 1885, the plaintiff was voted for, and received the highest number of votes, for justice of the peace, to fill out the unexpired term for which *Matheny* was elected. The plaintiff claims the office by virtue of this election, contending that under the provisions of § 11 of article 3 of the constitution, it was a proper election to fill the vacancy occasioned by the resignation of *Matheny*, while the defendant claims that the vacancy could not be filled by election until the regular city election held in April, 1886, and that he was entitled to hold the office by virtue of the appointment of the governor until that time. The question raised by the pleadings has been practically determined by former decisions of this court. In § 11 of article 3 of the constitution it is provided that "In case of vacancy in any

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judicial office, it shall be filled by appointment of the governor until the next regular election that shall occur more than thirty days after such vacancy shall have happened." The phrase "next regular election," found in the above provision, has been defined to be "the next election held conformably to established rule or law," and also "the regular election prescribed by law for the election of a particular officer to be elected." (*The State, ex rel. Watson, v. Cobb*, 2 Kas. 32; *Mathews v. Comm'rs of Shawnee Co.*, 34 id. 606.)

It is true that the statute provided for the annual election of township officers at the general election held in November, 1886, (ch. 195, Laws of 1885,) and if the particular office in contest was a township office, or one to be filled at the annual township election, the contention of the plaintiff would be correct. But we must take notice of the fact that Topeka is a city of the first class, with a population in excess of fifteen thousand. In § 48 of chapter 110 of the General Statutes of 1868, it is enacted that in cities having more than two thousand inhabitants, justices of the peace shall be elected at the regular city election. This is a valid statute, and still remains in force. (*Borton v. Buck*, 8 Kas. 302; *The State, ex rel., v. Farrell*, 20 id. 214.) It therefore furnishes the rule for de-

Justice of the
peace; elec-
tion to fill
vacancy, when.

termining the time when the vacancy in question should be filled, and settles it that the regular city election in 1886 was the next regular election occurring more than thirty days after the resignation of Matheny; and therefore the defendant was entitled to hold the office as justice of the peace until that time, and until his successor then chosen had qualified. Nothing in the constitution requires that justices of the peace shall be elected at a general election, nor that all justices of the peace shall be chosen at the same election. The legislature has full power to classify the cities and townships of the state, and to prescribe that the election of justices of the peace in cities of the first class shall be held at one time, in cities of the second class at another time, and in townships outside of such cities at still another time, or to make any other like classification of the townships which it

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may deem proper. A law fixing the time for the election of justices of the peace in any such class, as has been done by said § 48, and which operates alike upon all townships coming within that class, is a general law, and not obnoxious to the constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state.

It follows that no election for the office of justice of the peace could have been or was held in the city of Topeka at the general election in November, 1885, and therefore the demurrer of the defendant must be sustained.

All the Justices concurring.

26	318
51	763
53	155
35	318
59	709
35	318
69	704
35	318
71	105
71	184
35	318
72	219
72	665

PATRICK LANGAN v. THE CITY OF ATCHISON.

1. *CITY, When Liable for Negligence.* Where a person passing along the sidewalk of a much-traveled street in a city of the first class is injured by the falling of a bill or show-board, blown down by a strong wind, which bill or show-board was negligently and imperfectly constructed on private property, but was partly supported by studding or uprights nailed to the sidewalk, and was so near to and adjoining the sidewalk as to be dangerously contiguous thereto, and the officers of the city knew, before the falling of the bill or show-board, that it was not put up in a safe and proper manner, and that it was so insecure as to endanger persons passing on the street, *held*, the city will be liable in damages therefor, if the person so injured used ordinary care and prudence to avoid the danger.
2. *DEFECTIVE SIDEWALK — Use — Care Required.* A person is not to be entirely debarred from the use of a street because he may know it is defective or somewhat dangerous; but to be entitled to recover for the injury sustained by him by reason of the defective or dangerous condition of the street, he must have used ordinary care and prudence to avoid the danger.
3. *Contributory Negligence; Recovery.* Upon examination of the evidence in the record, *held*, that it cannot be said, as a matter of law, that the plaintiff was guilty of such contributory negligence as to bar any recovery.

Error from Atchison District Court.

ACTION by *Patrick Langan* against *The City of Atchison*, brought August 15, 1882, to recover \$3,500 as damages for personal injuries alleged to have been sustained by the plaintiff on September 26, 1881, while walking upon a sidewalk of the city, by the falling of a heavy structure of timbers and lumber used as bill-boards. The parts of the petition necessary to be stated are as follows :

“Long prior to the last-named date, defendant had caused and suffered to be constructed upon the south side of Commercial street and next west of Sixth street, within the corporate limits of said city, a large frame structure for the purpose of supporting thereon boards for the purpose of advertising shows, fairs, expositions, excursions and such other matters and things as are usually and commonly advertised by the posting of large paper bills. There had been long prior to that time upon the face or north front of such frame-work a large amount of boards and lumber, of the length of about forty-five feet, extending east and west upon said Commercial street, and of the height of about twelve feet, making about 550 square feet of one-inch lumber so supported upon said frame-work and constructed upon and adjoining the south side of the sidewalk and pavement upon said street. Said frame-work was, as constructed, dangerous, weak, defective and insufficient, and not constructed in a safe or secure manner. The uprights supporting said lumber were of insufficient strength to support the same and the pressure which might come against such lumber and frame-work, such as might be caused by the ordinary and common winds prevalent in that locality. The braces extending from said uprights were weak and insufficient to stay, support or strengthen the same to prevent said uprights and lumber thereon from being blown over and caused to fall upon the sidewalk and pavement in case of the pressure of such winds against the same. The fastenings of the ends of such braces were weak and defective, and insufficient to resist the strain of such winds upon the said lumber, uprights and braces, so as to make the said frame-work insecure and dangerous to passers-by along such street and sidewalk. Said frame-work and the lumber thereon had been in such condition for a long period of time prior thereto, to wit, for the space of more than two months, and all of which said weak and dan-

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gerous condition of said frame-work, supports and lumber was then and during all such time well known to the officers, servants and agents of said defendant. But notwithstanding the said notice and knowledge, the said defendant by its said officers, servants and agents had suffered and allowed said frame-work and lumber to be in such insecure, unsafe and dangerous condition during all said period of time without any effort on the part of said defendant, its servants or agents, or any other person or persons, to make the same safe and secure.

"Plaintiff further states, that the said frame-work was constructed along and adjoining a sidewalk in said city of Atchison, which was frequently and generally used, and frequently and commonly thronged with large numbers of passengers, footmen and others who went about said city in the ordinary and usual discharge of their business, and who were thereby exposed to danger and loss of life and limb from such insecure and unsafe and dangerous structure.

"Plaintiff further states, that on or about said 26th day of September, 1881, and while going along said sidewalk in the discharge of his usual and ordinary business, in a careful and cautious manner, and without any fault or negligence on his part, the said frame-work with the lumber thereon, because of such defective, dangerous and insecure construction thereof fell over and upon this plaintiff and thereby caused him great personal injury, and he did thereby receive great bodily harm, and his spine and back were greatly and severely injured, and ligaments and muscles of his said back were lacerated and sprained, and his body, shoulders, arms and ribs were seriously bruised and injured so that he was thereby disabled, wounded and made sick in body and mind, and suffered great physical pain and mental anguish, and was thereby rendered unable to attend to his usual and ordinary business for a long period of time, to wit, for the period of more than four months, and continuously since that time has been subject to recurrences of the injury and suffering and disability from the wounds so received, and which have at times disabled him and rendered him incompetent and unable to attend to his usual and ordinary business."

The defendant filed an answer, (omitting court and title,) which alleged:

"*First.* That it denies each and every allegation, statement and averment in said petition contained.

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"*Second.* For further answer to the petition of the plaintiff filed herein, defendant says: That if plaintiff received any damage or injury at the time and in the manner or of the character alleged in said petition, such damage and injury were wholly caused and occasioned by his own gross and willful fault, and without any negligence or carelessness on the part of the defendant or any of its agents, servants, officers or employés.

"*Third.* For further answer to the petition of the plaintiff filed herein, defendant says: That the 'bill-boards' which in plaintiff's petition are alleged to have caused the injury complained of, were built and constructed on private property by private persons, for their own exclusive use and benefit, and neither the defendant nor any of its officers, servants or employés had any interest or share in the construction thereof; nor any notice of any defect therein at any time, nor had they or any of them at any time notice that said 'bill-boards' were unsafe or insecure, nor of any fact which would lead to the suspicion that the same were unsafe or insecure."

To the answer plaintiff filed a reply. Trial had February 22, 1884, before the court, with a jury. After the plaintiff had presented all his evidence, the defendant filed a demurrer thereto, which was sustained, and the jury discharged. Within three days the plaintiff filed a motion for a new trial, which on March 22, 1884, was overruled, and thereon judgment was rendered against the plaintiff in favor of the defendant for all costs. The plaintiff excepted to the rulings and judgment, and brings the case here.

Jackson & Royse, for plaintiff in error.

Wm. R. Smith, city attorney, and *John C. Tomlinson*, for defendant in error.

The opinion of the court was delivered by

HORROR, C. J.: The plaintiff, passing along the south side of Commercial street, near Sixth street, in Atchison, was injured by a bill or show-board, which, having been placed on a lot adjoining the south side of the sidewalk, had been blown down by a strong wind and fell upon him. Upon the trial, a demurrer to plaintiff's evidence was sustained, the jury dis-

charged, and judgment rendered for the defendant. A motion for a new trial was made by the plaintiff, and overruled.

The record is before us for review, and the questions presented are—*first*, as to the liability of the city of Atchison to the plaintiff, if he was without fault, for the injuries inflicted upon him, as disclosed in the evidence; and *second*, whether, upon the facts proved, it can be said, as a matter of law, that the plaintiff was guilty of such contributory negligence as to bar him from the recovery of damages. The show or billboard, extending east and west upon Commercial street forty-five feet, and twelve feet high, stood upon an old foundation from which a building had been burned, and was built on private property close to and adjoining the south side of the sidewalk of the street. At the back of the structure were braces, and these were nailed to stakes driven into the ground, covered with bricks and ashes where the building had been burned. The braces were nailed against the stakes, and the stakes were three or four feet lower than the bottom of the billboard. To further support the structure, there were several places or notches cut in the sidewalk about three inches in size, and studding slipped in and nailed. Some of the witnesses testified that uprights assisted to support the structure and were spiked into the stringers of the sidewalk; and others, that parts of the structure were actually upon the south edge of the sidewalk. There was evidence introduced tending to show that the structure was negligently and imperfectly constructed, and that before and at the time of its fall it was in such a weak and insecure condition as to be unsafe for persons passing in front of it upon the sidewalk. There was also evidence tending to show that the officers of the city knew that the structure was not put up in a safe and proper manner, and that before its fall it was in a condition to endanger persons passing on the sidewalk.

The contention on the part of counsel for the city is that the billboard was private property, on private property, and used for private purposes only; and that if it were in close proximity to or even upon the edge of the sidewalk, the city would

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not be liable for injuries resulting from its negligent construction or its unsafe condition at the time of its fall.

We do not concur with this view. The decisions in this state are numerous that cities having the powers ordinarily conferred upon them respecting streets and sidewalks within their limits, owe to the public the duty of keeping them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for injuries resulting from the neglect to perform this duty. (*Jansen v. City of Atchison*, 16 Kas. 358, and cases there cited; *City of Salina v. Trospen*, 27 Kas. 544.) The injury occurred to plaintiff in September, 1881; at the time, Atchison was as now a city of the first class. Under chapter 37, Laws of 1881, entitled "An act to incorporate and regulate cities of the first class," etc., among other things the following duties and powers of the mayor and council of such cities are stated:

"To adopt all such measures as they may deem necessary for the protection of strangers and the traveling public, in person or property." (Art. 3, § 11, subdiv. 7.)

"To make regulations . . . to prevent and remove nuisances." (Art. 3, § 11, subdiv. 11.)

"To compel owners of property adjacent to walks and ways where dangerous, to erect and maintain railings, safeguards and barriers along the same." (Art. 3, § 11, subdiv. 15.)

"To enter into and examine all dwelling houses, lots, yards, inclosures and buildings of every description and other places, in order to ascertain whether any of them are in a dangerous state; and to take down or remove buildings, walls and superstructures that may become insecure or dangerous, and to require the owner of insecure and dangerous buildings, walls and other erections to remove or render the same secure and safe, at the cost of the owner or owners of such property." (Art. 3, § 11, subdiv. 18.)

"To require and regulate the planting and protection of shade trees in the streets and on public grounds of the city; the building of bulkheads, cellar and basement-ways, stairways, railings, window and doorways, awnings, hitching-posts and rails, lamp-posts, awning-posts, and all other structures projecting upon or over or adjoining the street or sidewalk, and all excavations through and under the sidewalks of the city." (Art. 3, § 11, subdiv. 27.)

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"To cause to be constructed all sidewalks, determine the material, plans and specifications of the same, and to levy and collect special taxes for the payment thereof." (Art. 3, § 11, subdiv. 43.)

"To compel owners or occupants of real property to keep in good order and proper place any of the improvements of any sidewalks, gutters, and also to clean and remove from sidewalks and gutters, ice, snow, or other substances." (Art. 3, § 26.)

Under the powers conferred upon the corporate authorities of cities of the first class by the provisions quoted, and other provisions of the statute, it is their duty to keep the streets and sidewalks in such a condition that persons passing over or along them may do so with safety and convenience. It is also the duty of the mayor, as the executive officer of the city, to see that all laws and ordinances are enforced, and that all subordinate officers perform their duties. That the streets and sidewalks may be in a reasonably safe condition, it is the duty of the corporate authorities to remove or abate any nuisance from the streets or sidewalks. We think, in this case, that the city, especially under its power to prevent and remove nuisances and to regulate all structures projecting upon or over or adjoining the street or sidewalk, was bound to remove or protect the sidewalk from the imperfectly constructed and insecure bill-board standing so near the sidewalk as to fall upon it. It was so close to or upon the edge of the sidewalk that it could not fall in that direction without falling

1. City, when
liable for
negligence.

upon it. Having failed to take the necessary steps to remove the bill-board, or to protect the sidewalk therefrom, the city is liable for the damages caused by the falling of the board upon any person passing in front thereof along the sidewalk, if such person was injured without fault on his part. We do not think it is very material whether the bill-board was so close to and adjoining the sidewalk as to be dangerously contiguous thereto, or was actually supported by braces or uprights resting upon the south edge of the walk. The liability of the city would be the same in either case. (*Grove v. City of Ft. Wayne*, 45 Ind. 429; *Parker*

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v. The Mayor &c. of Macon, 39 Ga. 725; *Duffy v. City of Dubuque*, 18 N.W. Rep. 900; 2 Dillon on Mun. Corp., §§ 789, 794, 795; *Jones v. New Haven*, 34 Conn. 1; *Kiley v. City of Kansas*, 69 Mo. 102; Wood on Nuisances, § 744; *Bassett v. City of St. Joseph*, 53 Mo. 290.) As announcing a contrary doctrine, we are referred by counsel of the city of Atchison, with apparently great confidence, to the cases of *Taylor v. Peckham*, 8 R. I. 349; *Hickson v. Lowell*, 79 Mass. 59; *Jones v. Boston*, 104 id. 75.

In *Taylor v. Peckham*, the town officials had not the same authority to enter upon or control the uses of property adjoining the street or highway as have the officials of cities of the first class in this state, and in that case the alleged liability was one created by statute alone; and it was decided that the courts could not enlarge the liability beyond the scope and intention of the statute.

In *Hickson v. Lowell*, the statute relating to the liability of towns was construed, and it was held that a town has discharged its duty under the statute when it has made the surface of the ground over which the traveler passes sufficiently smooth, level and guarded by railings to enable him to travel with safety and convenience, by the exercise of ordinary care on his part; and therefore that an injury resulting to a person on a sidewalk, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city, did not constitute a defect or want of repair in the way or street for which the town would be responsible.

The decision in *Jones v. Boston*, followed *Hickson v. Lowell*, and the court there held that an insecure sign suspended over the sidewalk on an iron rod fastened to a building, was of the same character as overhanging ice. These and other like decisions cannot be held as controlling under the statutes of our state, and the general principles of law which have already been announced by this court as to the liability of cities concerning streets and sidewalks. However, in *Drake v. Lowell*, 13 Metc. 292, and *Day v. Milford*, 5 Allen, 98, the city of Lowell in the one case, and the town of Milford in the other,

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were held liable for the injuries received by reason of defective awnings projecting over and across sidewalks, and the decisions do not appear to have been made upon the ground that the awnings or posts upon which they were supported were of themselves obstructions in the street; but those decisions are put exclusively on the ground of the insufficient strength or defective condition of the awnings, whereby persons passing upon the sidewalks were exposed to danger.

As to the alleged negligence of plaintiff, we think the trial court should have committed the case to the decision of the jury, because, under the circumstances, we do not think as a matter of law that the plaintiff was guilty of such contributory negligence as to bar any recovery. The question of contributory negligence is one for the jury to determine from the circumstances of the case, unless the facts raise such a presumption of negligence on the part of the injured person that the court is bound, as a matter of law, to instruct that no recovery can be had. "The fact that a person attempts to travel on a street or sidewalk after he has notice that it is unsafe or out of repair is not necessarily negligence." (*Corlett v. City of Leavenworth*, 27 Kas. 673.) The mere fact that a person knows the sidewalk is defective will not prevent him from using it; and ordinarily, a person is not obliged to forsake the sidewalk and travel in the street or take another way because he has knowledge of its defects. "The reasonableness of his action depends upon the distance of the surrounding way and the urgency of his need. And all this presents a question of fact for the consideration and determination of a jury." (*Maulby v. City of Leavenworth*, 28 Kas. 745; *Lyman v. Inhabitants of Hampshire Township*, [Supreme Court of Mass.,] 3 N. E. Rep., p. 211; *City of Emporia v. Schmidling*, 33 Kas. 485.) Of course a person having knowledge that a sidewalk is defective or somewhat dangerous, must use ordinary care and prudence to avoid danger.

2. Defective sidewalk; use; care required.

(*Munger v. City of Marshalltown*, [Sup. Ct. of Iowa,] 13 N. W. Rep. 642; *Corlett v. City of Leavenworth*, supra; *Schaeffler v. City*, 33 Ohio St. 246.) If the jury, upon

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the evidence in the record, had made a finding or returned a verdict that the plaintiff was guilty of contributory negligence, the finding or verdict would not be disturbed by this court, because there is testimony in the record tending to show that the plaintiff did not exercise ordinary care and prudence to avoid the danger; but the case stands in a different attitude before us from what it would occupy if the jury had passed upon the testimony. Then every conflict in the evidence and all the inferences therefrom would be resolved in favor of the result below; now they are against it.

The evidence shows that the plaintiff had knowledge of the defective construction of the bill-board; that it was liable to be blown down by the wind; and that a strong wind was blowing the day he was injured. It was also shown that there was another walk on the north side of the street, which was about eighty feet wide, by taking which he would have avoided the danger from the bill-board. On the other hand, as tending somewhat to qualify or rebut the alleged negligence of plaintiff, we cite the following facts: The bill or show-board had been constructed several months, perhaps a year or more, and the sidewalk in front of it was much traveled during all of this time; ever since it had been constructed the plaintiff had traveled over the sidewalk, once or twice every day; the day before he was injured he had opened a boarding house; that day he had been in the house most of the time, and out of the house only a few minutes before the injury occurred; the day was rainy and stormy, with a strong wind from the south; at the time of his injury he was going down the sidewalk to a printing office to get some business cards; by going upon the sidewalk where he was injured, he was sheltered from the rain and storm for quite a distance; he did not see the bill-board shake, or hear it crack, until it fell upon him.

In conclusion, it seems to us that here was testimony which ought to have gone to the jury. We do not mean to intimate that the jury ought to have found from all of the testimony that the plaintiff used ordinary care and prudence to avoid the danger, but we do say that,

3. Contributory negligence; recovery of damages.

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as a matter of law, the court had no right to say that the plaintiff was guilty of such contributory negligence as to bar him from any recovery.

The judgment of the district court will be reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

All the Justices concurring.

THE STATE OF KANSAS V. JOHN R. MILLER.

1. **MURDER**—*Verdict, Sustained.* The defendant, who was charged with murder, admitted that he shot and killed the deceased, but claimed that the act was justifiable. Upon an examination of the evidence given on the trial, it is held to be sufficient to sustain a verdict of murder in the second degree.
2. ——— *Testimony Given by Defendant.* The testimony given by the defendant on his preliminary examination, and which is reduced to writing and signed by him, may, when properly identified, be offered in evidence by the state against him.
3. **CONSPIRACY**, *Sufficiently Shown; Evidence.* Ordinarily a conspiracy should be established *prima facie* before the acts and declarations of one co-conspirator can be given in evidence against another, and in this case it is held that the conspiracy was sufficiently shown to warrant the admission in evidence of the acts and declarations of those who were charged with aiding and abetting the defendant in the commission of the offense.
4. **WITNESS**—*Changing Testimony.* When the witness admits that the testimony which she formerly gave in the case was untrue, and then proceeds to state what she claims is a correct relation of the facts, full inquiry should be allowed with respect to what led her to make the so-called untrue statements, as well as the influences which subsequently caused her to change her testimony; but where such witness has quite fully stated what was said and done by those who were urging her to return to the witness stand and tell the truth, the refusal of the question as to what she was crying about in their presence, is not such an error as will work a reversal of the judgment.

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5. **CHARGE OF COURT, *How Considered.*** The charge of the court is to be considered as an entirety, and if, when so considered, it correctly states the law, the mere misuse of a word in one part of the charge, which it appears could not have misled the jury, will not warrant a reversal.
6. **NEW TRIAL; *Former Conviction, No Bar.*** When the defendant, charged with murder, was convicted of manslaughter in the fourth degree, and thereupon moved for and obtained a new trial, he thereby placed himself in the same position as if no trial had been had, and the conviction for manslaughter in the fourth degree was no bar to a subsequent conviction of a higher degree of the offense charged. (*The State v. McCord*, 8 Kas. 282.)
7. ——— ***Jury; Conduct.*** The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial when it is not shown that the jurors read any part of what was written in such transcript.

Appeal from Osborne District Court.

INFORMATION for murder, charging *John R. Miller* with the murder of *Delbert J. Tunison*, on May 19, 1885. At the September Term, 1885, the defendant was convicted of murder in the second degree, and sentenced to imprisonment in the state penitentiary for a term of ten years. Defendant appeals. The opinion contains a sufficient statement of the facts.

Hays & Pitts, and *Walrond, Mitchell & Heren*, for appellant.

*A. Saxe*y, county attorney, for The State.

The opinion of the court was delivered by

JOHNSTON, J.: On June 1, 1885, an information was filed in the district court of Osborne county, charging *John R. Miller* with the murder of *Delbert J. Tunison*, and also charging that *John Cranshaw* and *Albert Whitaker* aided and abetted *Miller* in the commission of the crime. At the trial, had the following September, a verdict was returned finding that *John R. Miller* was guilty of manslaughter in the fourth degree. Upon his motion a new trial was granted, and immediately entered upon. This trial resulted in a conviction of murder in the second degree, from which he appeals to

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this court. He alleges numerous grounds of error, which we will consider and dispose of in the order of presentation here.

The first point made is, that the evidence is not sufficient to sustain the verdict. The defendant acknowledged that on May 19, 1885, he shot and killed Delbert J. Tunison with a gun loaded with bird-shot, but he claims that the killing was justifiable, because the deceased was in the act of stealing certain horses, and also that there were reasonable grounds to believe that he was about to be killed by the deceased, or was in danger of great bodily harm. A statement of some of the leading facts together with what the testimony offered by the state tended to show, will be enough to make it appear that the verdict was not without support.

It appears that on Saturday, May 16, 1885, a difficulty occurred between Tunison and his wife, the exact nature of which is not shown. Her father, Jeremiah Miller, who lived eight miles away, learned of the trouble on Sunday evening, went at once to the residence of Albert Whitaker, who was jointly charged with the defendant, and who was a near neighbor of the Tunisons, and remained there until Monday forenoon. Before noon of that day, and while Tunison was absent from home, Jeremiah Miller, accompanied by Albert Whitaker, went to Tunison's house and hitched a pair of horses found there to a wagon and took Mrs. Tunison and the children to his home, carrying with them some goods and a cow found upon the premises, which property, together with the horses, was claimed by Mrs. Tunison as her individual property. The horses were also claimed by Tunison to be his property. The defendant is a son of Jeremiah Miller, and has made his home with him when not employed elsewhere, as also did his co-defendant, John Cranshaw, who is a son-in-law of Jeremiah Miller. At this time the defendant was at work in Osborne City, which was distant eleven miles from his home, and Cranshaw was engaged in Glen Elder, still farther away. On Monday night the defendant and John Cranshaw hired a team at Osborne City, and drove home, where they

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found Jeremiah Miller and wife, Charles Miller, Albert Whitaker, Mrs. Tunison, and Mrs. Cranshaw.

The testimony of the state tended to show that all of the parties anticipated that Tunison would come there during the night to retake the horses claimed by him. It was also testified that on the day previous the defendant visited his home and heard of the difficulty between Tunison and his wife, and then threatened that he would kill Tunison within a week. There was also testimony that Cranshaw stated to parties in Osborne, from whom he hired the team on Monday night, that they wanted the team to go out home; that Tunison and his wife had separated, and she had gone home; and that Tunison was expected to go there that night, and if he did there would be trouble, and they were going out to take a hand in it. The parties all remained in the house until about ten o'clock at night, when a noise was heard at the barn, and defendant and Charles Miller went out there but found no one. They did not return to the house, but took a position in the barn where the horses stood, and where it was so dark that one object could not be distinguished from another. The defendant was armed with a shot-gun, which he says he accidentally found in the barn, and he and Charles Miller remained upon watch in the barn undisturbed until about midnight, when Tunison came into the barn, and without interference unloosed and took out a horse which proved not to be one of those claimed by him, but belonged to Cranshaw. He tied this horse to a post near by, and returned to the barn. While he was out, the defendant changed his position in the barn, holding the gun in such manner that it could be readily used, and when Tunison was stepping into the barn the second time, the defendant shot him in the neck, when he fell backward and expired in a few hours afterward. This testimony, together with many circumstances which are not stated, tends strongly to show that the killing was wholly without justification.

We do not overlook the fact that there was testimony contradictory to some extent of that which has been stated, nor

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that testimony was given of threats made by Tunison that he was going after the horses and would kill anyone who interfered with him, and burn and destroy Miller's property, and that these threats were communicated to the defendant and other members of the family. There was also testimony in behalf of the defendant that when Tunison entered the stable door at the time he was shot, the defendant ordered him to halt, and that Tunison made a motion with his right hand as if to shoot, at the same time stating, "I have the drop on you, and I will kill you for luck." Under the testimony and theory of the defendant, that Tunison came there to steal horses, and that while attempting to prevent him from committing a felony the deceased drew a revolver and pointed the same at the defendant in such a way that he had reasonable grounds to believe that his life was in imminent danger, he was justified in shooting the deceased. But the jury were at liberty to disbelieve the testimony of the defendant, and to accept the theory of the state, as they manifestly did do, that Tunison went there not to steal horses, nor to injure the Millers in person or property, but for the sole purpose of recovering the horses, which he claimed as his own, and that the defendant had no reasonable cause to apprehend a design on the part of the deceased to kill or injure him.

There is considerable in the testimony of the defendant which tends to weaken his claim, and which correspondingly strengthens the theory of the state. It is claimed by the state that the deceased did not bring a revolver with him, and that the one said to have been found upon his person after he was killed was placed there by some member of the Miller family. One improbability in the testimony of the defendant to which our attention has been called, is the statement claimed to have been made by Tunison, just before he was shot, that he had the drop on the defendant and would kill him, when it appears that it was so dark in the barn where the defendant stood that it was impossible for the deceased to have seen him. The revolver claimed to have been found on his person was not discharged by the deceased, and yet every barrel was

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empty when it was examined. That the deceased would carry an empty revolver in such a case, or would draw and point it into the darkness, seems somewhat unlikely. Besides, the location of the wound, as well as the course taken by the shot which penetrated his body, would indicate that the deceased was not in such a position as he naturally would have assumed if he had been aiming at or attempting to shoot the defendant. Then again, it is admitted that they anticipated that he was coming there during the night after the horses, but instead of warning him to desist, or taking any steps to prevent his trespassing upon the premises, they lay in wait and killed him with but little if any warning. So far as the protection of the property was concerned, it would seem that the killing of the deceased was unnecessary. In addition to the defendant and his brother, who were in the barn, there was Jeremiah Miller, Albert Whitaker and John Cranshaw, who were at the house within easy call, and who knew of his coming, and could have assisted in driving him away. If the trespass could have been prevented, or if the threatened danger to the person of the defendant, or to the property which he claimed to be guarding, could have been avoided or prevented by any other reasonable means within his power, the killing of the deceased was unnecessary and inexcusable. (*Weaver v. The State*, 19 Tex. Ct. of App. 547; same case, 33 Alb. L. J. 408.) But we do not assume, nor is it our province, to weigh the testimony that was given. It was conflicting, and the conclusion of the jury depended very largely upon the credibility of the witnesses produced upon the respective sides. The province of weighing the testimony in such cases belongs exclusively to the jury, and if upon inspection of

1. Murder; verdict sustained. all the evidence offered in the case we find enough to sustain the conclusion of the jury, the verdict will not be disturbed. A careful reading of the record leaves no doubt in our minds that the verdict is warranted by the testimony.

During the trial the state introduced and read in evidence the testimony given by the defendant at the preliminary ex-

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amination, over his objection. The testimony was signed by the defendant, and constituted his written declaration concerning the offense for which he was being tried, and if properly identified, was admissible in evidence. It is now claimed that it was not identified, but this objection was not made in the court below, where it seems to have been conceded by both parties to have been the evidence which he gave, and cannot be now made.

It is next claimed that the court erred in permitting W. B. Bowen and Samuel Bowen to testify to statements made by John Cranshaw in the absence of the defendant, regarding the purpose for which the defendant and Cranshaw desired a team to go to Miller's on Monday night, and what they proposed to do when they got there in case Tunison should come after the horses. It will be remembered that Cranshaw was charged with having aided and assisted the defendant in the murder of Tunison. Cranshaw's statements were admitted upon the theory that he was a co-conspirator with the defendant. It is conceded that "ordinarily when the acts and declarations of one co-conspirator are offered in evidence against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause. But this cannot always be required. It cannot well be required where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, and a vast number of isolated and independent facts." (*The State v. Winner*, 17 Kas. 298.) However, in this case we are of the opinion that

2. Testimony given by defendant.
3. Conspiracy sufficiently shown.

when the testimony objected to was offered, enough had already been shown, and Cranshaw was so far implicated with the defendant, as to warrant the court in admitting the testimony. The court fully protected the interests of the defendant in this regard when it instructed the jury that they should disregard the evidence of all statements made by Cranshaw in the absence of the defendant, unless they found from the evidence that before the statements were made Cranshaw had entered into a conspiracy or understanding with the defendant to do some unlawful act to the

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person of the deceased, and that such statements or preparations were made for the purpose of furthering the object of such conspiracy or understanding.

Several objections, most of which are immaterial, are urged to the rulings of the court upon the testimony given by a witness for the state named Zoe Eaton. This witness was keeping company with the defendant, and had accompanied him to Jeremiah Miller's on the Sunday preceding the killing of Tunison. The county attorney hearing that the witness had stated that the defendant while in her company on that day spoke of the difficulty of Tunison with his wife, and at the same time threatened to take his life, called her as a witness for the state. At that time she denied having made such statements, and denied that the defendant had spoken of Tunison or made any threats against him in her presence. Before the examination was concluded, however, she returned to the witness stand and changed her testimony, giving a detailed account of her conversation with the defendant, in which he

4. Witness;
changing
testimony.

spoke harshly of the deceased, and threatened to take his life. Considerable testimony, some of which was objected to, was given by her concerning the causes which led her to correct the evidence first given. Each party claimed that she had been tampered with by the other, and under the circumstances it was competent to examine closely into the influences which led to the contradictory statements, in order to determine how much credit should be placed upon the testimony given upon the final trial. On cross-examination she was asked what she was crying about in the probate judge's room. This question was refused. It was in this room where, at the instance of her father and others, she consented to go back upon the witness stand and relate what she now insists is the truth. Having stated that she was crying while there, the question was a proper one. It was probably excluded by the court because the witness had already quite fully stated what was said and done in that room to influence her to correct her testimony. This being so, we

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think the defendant was not prejudiced by the refusal of the question asked the witness.

The eighth, ninth, tenth, and eleventh objections are without merit, and the twelfth is that the court would not permit the defendant to prove that the property taken by Mrs. Tunison and her father from her husband's premises was her separate and individual property. This objection is not tenable. It would have been improper to have entered upon the trial of the right to or ownership of the property in this proceeding. It did appear that the property was claimed in good faith by each of the parties as his or her individual property, and this was the extent to which it was proper to go.

The thirteenth and fourteenth objections are without force, and the fifteenth is a criticism of the instructions given to the jury. We have examined them, and find that the defendant has no cause for complaint except where the court, in speaking of the law of self-defense, states that "before a person can avail himself of the defense that he used a weapon in defense of his life, he must *satisfy* the jury that that defense was necessary," etc. Separating this passage from the general charge, and considering it alone, it might appear to shift the burden of proof respecting one phase of the case upon the defendant, while it is well established that the presumption of innocence is with the defendant, and that the burden of proof rests on the state throughout the trial. But the instructions

5. Charge of
court, how
considered.

are to be considered as an entirety, and in another portion of the instructions the court specifically charges the jury that "the burden of establishing the guilt of the defendant rests upon the state, and in no stage of the case does the burden shift upon the defendant to prove his innocence, or to prove that the killing of Tunison was justifiable." The erroneous use of the word "satisfy," of which complaint is made, might possibly have resulted to the prejudice of the defendant if the court had not, in treating upon the same subject, clearly stated the burden to be upon the state, and we therefore think that the jury could not have been misled.

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Another instruction complained of is where the court instructed the jury that they might, if the evidence warranted it, find the defendant guilty of murder either in the first or second degree. Upon the first trial the defendant was found guilty of manslaughter in the fourth degree. He was awarded a new trial upon his application, and the claim is that he could not afterward be convicted of a higher degree of crime than manslaughter in the fourth degree. This

6. New trial; former conviction, no bar.

question has already been determined against the contention of the defendant, where it was decided that the granting of a new trial on the motion of the defendant places him in the same position as if no trial had been had. (*The State v. McCord*, 8 Kas. 232.)

It is finally urged that the motion for a new trial should have been granted upon the grounds of improper conduct of the jury, and improper remarks of the counsel for the state in the argument to the jury. It appears that during the last trial the county attorney made use of the stenographer's transcript of the testimony taken on the first trial, and affidavits

7. Conduct of jury.

were offered that several members of the jury, during a recess of the trial, took this transcript from the table in the court house where it was lying, and were apparently reading it; and that the transcript contained testimony not produced before the jury in the final trial. A sufficient answer to this objection is, that it was not shown that the members of the jury who handled the transcript read any portion of the evidence. The court finds specially from all the testimony offered on the motion for a new trial, that it did not appear that the jury read any part of what was written in the transcript.

We find nothing in the argument of counsel, nor in any of the errors assigned, that would warrant a reversal of the judgment, and it will be affirmed.

HORTON, C. J.: An examination of the record satisfies me that the district court committed some errors upon the trial, but I do not think that these errors affected the result in vio-

The State v. Hilton.

lation of substantial justice; and § 293 of the criminal code provides that on an appeal (in criminal cases) the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. Therefore I concur in the affirmance of the judgment of the district court.

VALENTINE, J.: I concur in the judgment of affirmance in this case. For while I think the court below committed a few errors, yet I have no doubt of the correctness of the final result reached. The errors evidently did not affect any of the defendant's substantial rights.

THE STATE OF KANSAS V. W. H. HILTON.

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1. **FORGERY; Instrument Good on its Face; Extrinsic Evidence.** A false instrument or writing, made out with criminal intent to defraud, which is good on its face, may be legally capable of effecting the fraud, even though inquiry into extrinsic facts or matters not appearing on its face would show it to be invalid, even if it were genuine; therefore, the forging of such an instrument or writing is an offense under the statute. (Crimes Act, §§ 129, 139.)
 2. **FORGERY, Facts Constituting.** One B. had his life insured in a mutual benefit insurance company of Ohio; one of the officers of the company received a notice that B. had died in this state; upon receiving the notice he forwarded blanks for proof of death to the address of the beneficiary in the policy of the alleged deceased, the blanks being in the forms of proofs of death in use by the company; the defendant was appointed a committee to investigate the cause of the death of B., and after a short time the proofs of death were sent by him from this state to an officer of the insurance company in Ohio; these proofs of death were false and untrue, because in fact B. was not dead as alleged; the papers returned by the defendant to the company were headed "Official Notice and Proof of Death;" on the first page there appears in blank, "The foregoing and the report of the committee, together with the certificates thereunto annexed," with certain questions purporting to be answered concerning the death

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of the alleged deceased; on page two is the certificate of the attending physician, with the statement of an officer under oath that the physician is respectable, entitled to credit, and engaged in active practice; on the third page is a report of the council examining committee on the cause of the alleged death, and on the same page an undertaker's affidavit and a clergyman's certificate — the first stating when the remains of the alleged deceased were interred, and the other giving the date of the funeral of the alleged deceased; on the fourth page are blanks for certain officers of the insurance company to sign, setting forth that they have examined the reports and certificates of the death of the member, and approved the same; the blanks on this page were never signed or filled up. Upon receiving the proofs of the alleged death, the insurance company discovered that there was a material discrepancy in the proofs presented, in this: From the certificate of the attending physician and the statement of the committee appointed to examine the cause of the alleged death, it appeared that the alleged deceased died May 2, 1885, while the undertaker's affidavit and clergyman's certificate showed that the funeral of the alleged deceased and his burial were prior thereto, to wit, on March 4, 1885; the defendant was thereupon arrested for the forgery of the undertaker's affidavit and the clergyman's certificate. *Held*, That the false affidavit and certificate which the defendant executed must be treated as complete and separate instruments, and the same as though they were wholly detached from the other papers constituting the proofs of death; and being in the exact form required by the insurance company, and not being in any way invalid or defective upon their faces, are the subject of forgery within the terms of the statute. (Sections 129 and 139, *supra*.)

Appeal from Mitchell District Court.

ON October 22, 1885, there was filed in the district court of Mitchell county, by the county attorney of that county, an information containing twelve counts, against *W. H. Hilton* and *Joel Miley*. The first and second counts thereof were in words and figures, to wit:

"*1st Count.* I, F. J. Knight, county attorney, of, within and for the county of Mitchell, and state of Kansas aforesaid, in the name, by the authority, and on behalf of the state of Kansas, come now here and give the court to understand and be informed that on or about the 20th day of June, 1885, and at and within the county of Mitchell and state of Kansas aforesaid, one *W. H. Hilton* and one *Joel Miley*, persons then and there being, unlawfully, falsely, fraudulently and feloniously

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ously then and there did make, forge and counterfeit one certain instrument and writing purporting to be the act of another, that is to say, of N. G. Munn, by which instrument and writing a certain pecuniary obligation purported to be transferred, the said instrument and writing then and there being in the words and figures following, that is to say :

“‘**UNDERTAKER’S CERTIFICATE.**—I, N. G. Munn, do hereby certify that I am an undertaker, residing at No. — street, city of Mitchell, state of Kansas, and as such undertaker I attended the funeral of C. W. Brown, and that his remains were interred in — cemetery at (city or town of) Mitchell, on the 4th day March, 1885.

N. G. MUNN.

[Signature of Undertaker.]

‘Sworn and subscribed to before me, this 22d day of June, 1885.’

S. PEELE, J. P.’

With the intent then and there, and thereby falsely, unlawfully and feloniously, to cheat and injure and to defraud of the sum of five thousand dollars the National Union of Mansfield, Ohio, a corporation duly organized, incorporated, existing, and acting under and by virtue of the laws of the state of Ohio, which said corporation, on or about the 12th day of July, 1884, issued to one Sarah Brown, the wife of the said C. W. Brown, one certain certificate or policy of insurance, whereby the said corporation, for a valuable consideration, well and truly undertook and promised to pay to the said Sarah Brown the sum of five thousand dollars upon the decease of the said C. W. Brown and the reception by said corporation of proof of such decease, and which said certificate or policy of insurance was valid, outstanding and in force at the time of the false making, forging and counterfeiting of the aforesaid instrument and writing; and the said W. H. Hilton and Joel Miley, so as aforesaid, did falsely make, forge and counterfeit the aforesaid instrument and writing, for the purpose and with the intent of causing the said instrument and writing to be presented to the said corporation as and for proof of the decease of the said C. W. Brown, and with the intent to procure from the said corporation, and to cheat and defraud the said corporation out of the sum of five thousand dollars, which the said corporation had, by the terms of its said certificate and policy of insurance, undertaken and agreed to pay upon the reception by the said corporation of proof of the decease of said C. W. Brown.

“2d Count. I, the undersigned, county attorney of said county, do hereby give the court here to understand and be informed, that on or about the 20th day of June, 1885, and at and within the county of Mitchell and state of Kansas as afore-

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said, one W. H. Hilton and Joel Miley, persons then and there being, then and there unlawfully, falsely, fraudulently and feloniously did make, forge and counterfeit one certain instrument and writing purporting to be the act of another, that is to say, of H. G. Miller, by which instrument and writing the right and property of, in and to the sum of five thousand dollars purported to be affected, the said instrument and writing then and there being in the words and figures following, that is to say:

“CLERGYMAN’S CERTIFICATE.—I, H. G. Miller, do hereby certify that I am a clergyman, residing at Blue Hills, Kansas, and that I officiated at the funeral of the late C. W. Brown on the 4th day of March, 1885.

H. G. MILLER.

[Signature of clergyman.]”

With the intent then and there, and thereby falsely, unlawfully and feloniously to cheat and injure and to defraud of the sum of five thousand dollars the National Union, of Mansfield, Ohio, a corporation duly organized, incorporated, existing and acting under and by virtue of the laws of the state of Ohio, which said corporation, on or about the 12th day of July, 1884, issued to one Sarah Brown, the wife of the said C. W. Brown, one certain certificate or policy of insurance, whereby the said corporation, for a valuable consideration, well and truly undertook and promised to pay to the said Sarah Brown the sum of five thousand dollars upon the decease of the said C. W. Brown and the reception by said corporation of proofs of such decease, which said certificate or policy of insurance was valid, outstanding and in force at the time of the false making, forging and counterfeiting of the said instrument and writing as aforesaid; and the said W. H. Hilton and Joel Miley, so as aforesaid, did falsely make, forge and counterfeit the aforesaid instrument and writing, for the purpose and with the intent of causing the said instrument and writing to be presented to the said corporation as and for proof of the decease of the said C. W. Brown, and with the intent to procure from the said corporation and to cheat and defraud the said corporation out of the said sum of five thousand dollars, which the said corporation had, by the terms of its said certificate and policy of insurance, undertaken and agreed to pay upon the reception by the said corporation of proof of the decease of the said C. W. Brown.”

The alleged proof of death and the papers to which the undertaker’s certificate and the clergyman’s certificate above referred to were attached, were in the following words and figures, to wit:

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OFFICIAL NOTICE AND PROOF OF DEATH.

SENATE OF NATIONAL UNION,
HALL OF MANSFIELD COUNCIL, No. 85, }
LOCATED AT MANSFIELD, STATE OF OHIO.

To Geo. W. Harn, Senate Secretary, National Union: By vote of this Council we are instructed to certify that friend Charles W. Brown, a 5th-rate member of this Council, died at Blue Hills, state of Kansas, in good standing in the order, on the 2d day of May, 1885, at 3 o'clock P. M. Deceased was admitted to the order May 3d, 1884; residence at date of initiation, Indianapolis, Ind.; age assessed at initiation, 28 years; amount of first assessment, \$1 $\frac{41}{100}$; age at death, 29 years; amount of last assessment, \$1 $\frac{45}{100}$; No. of benefit certificate, 4,000; No. on roll-book, 44; cause of death, congestion of the lungs; first assessment paid by deceased at initiation, No. 12; deceased was suspended —; cause of suspension, —; deceased was reinstated —; assessments not paid during suspension, —; last assessment paid by deceased, No. —; total amount paid by deceased to benefit fund, \$15 $\frac{85}{100}$; residence at time of death, Blue Hills, state of Kansas; person or persons named in the benefit certificate to whom the benefit is to be paid, Sarah Brown, wife.

QUESTIONS TO BE ANSWERED.

Are all the persons named in the benefit certificate living? Ans. Yes. Are any of the beneficiaries minors? If so, give the name and age. Ans. No. Has a guardian of the estate of the minor beneficiary been appointed? Ans. There are no minors. Where do the beneficiaries reside? Ans. In Mitchell county, Kansas.

The foregoing and the report of the committee, together with the certificates hereunto annexed, were read in open Council on the 5th day of August, 1885, approved, noted in Council minutes, and ordered to be transmitted herewith to the Senate secretary.

In witness whereof, we have hereunto set our hands and affixed the seal of the above-named Council, on this — day of —, 188—.

[Council Seal.]

Yours, in L., P., T.,

_____, *Council President.*

_____, *Council Secretary.*

ATTENDING PHYSICIAN'S CERTIFICATE.

_____, STATE OF _____, 188—.

This is to certify, that I was the attending physician in the

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last sickness of Charles W. Brown, and that he died at Blue Hills, state of Kansas, on the 2d day of May, 1885, at 3 o'clock P. M.; cause of death, congestion of the lungs; duration last sickness, three days.

QUESTIONS TO BE ANSWERED.

1. How long have you practiced medicine? Ans. Thirteen years.

2. Where did you receive your medical education? Ans. Graduated Keokuk, Iowa.

3. Name of deceased? Ans. Charles W. Brown.

4. How long, if ever, were you the medical adviser of deceased? Ans. Only in his last illness.

5. Had deceased any other medical adviser? If so, give name and address. Ans. No.

6. Date of your first prescription, or visit, in last sickness of deceased? Ans. April 30th.

7. Had the deceased been suffering from this illness before you prescribed for him? If so, how long? Ans. No.

8. Date of your last visit? Ans. May 2d, 1885.

9. Were there any preëxisting diseases, habits, tendency to disease, or infirmities which may have had any influence in causing or hastening deceased's death. Ans. No.

10. Give an account of the principal symptoms and progress of the disease? Ans. Chilliness, dys—cough, spitting of blood, rapid pulse, and prostration.

11. State the cause of death, and whether or not there was a post-mortem examination; if so, what was shown by it? Ans. Congestion of lungs; no post mortem.

12. Was there anything in the habits of deceased, his occupation or family history that rendered him liable to this disease or any other? Ans. No.

13. State any other facts pertaining to last sickness and death of deceased? Ans. I have none.

J. MILEY, M. D.

[Signature of attending physician.]

STATE OF KANSAS, COUNTY OF MITCHELL, ss.—Personally appeared before me, on this 16th day of June, 1885, the above-named ———, personally known to me as the physician whose name is subscribed to the foregoing affidavit, and whom I know to be a respectable physician, entitled to credit, and engaged in active practice at Beloit, county of Mitchell and state of Kansas, and made oath before me, a

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clerk of district court, that the foregoing statement made by him is true.

Witness my hand and official seal, the day and year above stated.

[Seal.]

JOHN MEHL, *Clerk of District Court.*

REPORT OF COUNCIL EXAMINING COMMITTEE ON CAUSE OF DEATH.

HALL OF ———, COUNCIL No. ———, N. U.,
LOCATED AT ———, COUNTY OF ———, STATE OF ———. }

To the Officers and Members of above Council N. U.: Your committee appointed to investigate the cause of the death of friend Chas. W. Brown, late a 5th-rate member of this Council, and also of all the circumstances attending and connected with said death, do hereby report that they have duly made such investigation, and report the following facts:

Cause of death, congestion of lungs; date of death, 2d day of May; duration last sickness, just three days; place of death, Blue Hills, Mitchell county, Kansas; name and address of attending physician, Joel Miley, Beloit, Kansas; name and address of undertaker, N. G. Munn, Blue Hills district; cemetery and town where buried, county grave yard, in vicinity of church; residence of deceased at time of death, Blue Hills, Mitchell county, Kansas.

REMARKS: I learned on inquiry that friend Brown's habits of life were correct, and health very good up to a very short time before his last illness.

Signed by W. H. HILTON,

[Council seal.]

_____,
_____,

Attested by

Committee.

_____, *Secretary.*

_____, *President.*

Dated _____ 188 .

Name and address of treasurer of Council, _____.

UNDERTAKER'S CERTIFICATE.

I, N. G. Munn, do hereby certify that I am an undertaker, residing at No. ——— street, city of Mitchell, state of Kansas, and as such undertaker I attended the funeral of C. W. Brown, and that his remains were interred in ——— cemetery, at city of Mitchell, on the 4th day of March, 1885.

N. G. MUNN.

[Signature of undertaker.]

Sworn and subscribed before me, this 22d day of June, 1885.

[Seal of court.]

S. PEELE, J. P.

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CLERGYMAN'S CERTIFICATE.

I, H. G. Miller, do hereby certify that I am a clergyman, residing at Blue Hills, and that I officiated at the funeral of the late ———, on the 4th day of March, 1885.

H. G. MILLER.

[Signature of clergyman.]

MEDICAL DIRECTOR'S CERTIFICATE.

————— 188—.

To ———, *Senate Secretary*: I hereby certify that I have examined the within reports and certificates, and believe them to be ———correct, and ———approve of including the within-mentioned death in the next assessment, and of issuing a draft on the benefit fund in favor of the beneficiaries for the amount they are entitled to, in accordance with the laws and usages of the order relating thereto.

Record and publish the cause of death as follows: ———.

REMARKS: ———.

[Signed] ———, M. D.,

Medical Director of the Senate of the N. U.

CERTIFICATE OF THE PRESIDENT OF THE SENATE.

————— 188—.

To ———, *Senate Secretary*: I hereby certify that I have examined the within reports and certificates, and believe them to be ———correct, and hereby ———approve of including the within-mentioned death in the next assessment, and of issuing a draft on the benefit fund in favor of the beneficiaries for the amount they are entitled to, in accordance with the laws and usages of the order relating thereto.

REMARKS: ———.

[Signed] ———,

President of the Senate of the N. U.

Trial had at the October Term, 1885. On November 5, 1885, the jury returned a verdict of guilty against the defendant Hilton, of the crime of forgery in the third degree, as charged in the information. Subsequently a motion in arrest of judgment was filed, and also a motion for a new trial. These were overruled, and the defendant was sentenced to be confined at hard labor in the penitentiary of the state for the term of seven years from November 13, 1885, and also was adjudged to pay all the costs of the prosecution, taxed at \$204.30. He appeals.

H. A. Yonge, Horace Cooper, and Holt & Hicks, for appellant.

S. B. Bradford, attorney general, *F. J. Knight*, county attorney, and *A. H. Ellis*, for The State.

The opinion of the court was delivered by

HORTON, C. J.: The facts in this case are these: Charles W. Brown had his life insured in a mutual benefit insurance company of Mansfield, Ohio, called "The National Union," for the sum of \$5,000, payable, on proof of his death, to Sarah Brown, his wife. This insurance company conducted its business chiefly through a number of men selected by the policyholders, who constituted a body called the senate of the National Union. The defendant was a policyholder in the company, and formerly resided at Mansfield. He held an office in the company known as deputy senator; the duty of such officer was, in part, to organize councils, which bore the same relation to the senate that subordinate lodges of masons bear to the grand lodge of the state. He located at Beloit, in this state, in the spring of 1885. Soon after, the secretary of the council to which Charles W. Brown belonged, received notice that he had died at Blue Hills, Mitchell county, in this state. Upon the receipt of this intelligence, the secretary forwarded blanks for proof of death to the address of Mrs. Sarah Brown, the blanks being the forms of proof of death in use by the company. The defendant was then appointed by the council to which Brown belonged a committee to investigate the cause of his death, and after a short time the proofs of death were sent by the defendant to the secretary of the council. Dr. Joel Miley made affidavit that Brown died May 2, 1885, after an illness of three days; and John Mehl made a statement that Miley was a respectable physician, entitled to credit, and in active practice. The affidavit of Miley was false, though made and signed by himself. The defendant made a statement, signed by himself, upon the third page of the proof of death, that Brown died May 2, 1885, but this

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was also false. Attached to this proof of death were the following affidavit and certificate:

"**UNDERTAKER'S CERTIFICATE.**—I, N. G. Munn, certify that I am an undertaker, residing at No. — street, city of Mitchell, state of Kansas, and as such undertaker I attended the funeral of C. W. Brown, and that his remains were interred in — cemetery, at Mitchell, on the 4th day of March, 1885.

N. G. MUNN.

"Sworn and subscribed before me, this 22d day of June, 1885.
S. PEELE, J. P."

"**CLERGYMAN'S CERTIFICATE.**—I, H. G. Miller, do hereby certify that I am a clergyman, residing at Blue Hills, Kas., and that I officiated at the funeral of the late C. W. Brown on the 4th day of March, 1885.

H. G. MILLER."

Upon receiving the papers containing the alleged proof of death, the secretary of the senate of the National Union at once discovered that in the statement of the defendant it appeared that Charles W. Brown had not died until May 2, 1885, while the undertaker's and clergyman's certificates showed that Brown had been buried on March 4, 1885. The secretary at once wrote to the defendant as to this discrepancy, and he answered, if the papers were returned to him he would try to have the errors corrected, as they were simply clerical. The papers were not returned, nor were the proofs approved, and no money was paid upon the policy issued to Brown. Subsequently an information was filed by the county attorney of Mitchell county, in this state, against the defendant, charging him with the forgery of the "undertaker's certificate" and the "clergyman's certificate" sent to the secretary of the National Union to obtain the payment of \$5,000 upon the life policy taken out by Charles W. Brown in the National Union. Upon the trial, the defendant was convicted of forgery in the third degree, and sentenced to confinement and hard labor for the term of seven years. From the judgment he appeals to this court.

The contention of counsel for defendant is, that the making of the affidavit of the undertaker and the certificate of the attending clergyman could not, in this instance, be forgeries,

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and in support hereof, cite the rule of criminal law that an instrument void upon its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud. In support of this contention, it is claimed that the affidavit and certificate were a part of the "official notice and proof of death," and that all the papers constitute only one instrument; that other recitations in the instrument are so repugnant and irreconcilable to those set forth in the affidavit of the undertaker and the certificate of the clergyman, the whole death proof is a mere nullity and absolutely void upon its face. The claim of counsel is more plausible than sound. We concede that a writing invalid on its face cannot be the subject of forgery, but a false instrument, which is good on its face, may be legally capable of effecting a fraud, though inquiry into extrinsic facts would show it to be invalid, even if it were genuine; therefore the forging of such an instrument is a crime. (Sections 129 and 139 of the act regulating crimes and punishments; 2 Bishop on Crim. Law, 7th ed., §§ 538-541.) The papers headed "Official Notice and Proof of Death" embrace several separate and complete documents or written instruments. On page one we have a statement, with questions answered; on page two, the certificate of the attending physician, with the statement of an officer, under oath, that the attending physician is respectable, entitled to credit, and in active practice; on the third page there is a report of the council examining committee on the cause of death, and on the same page the undertaker's affidavit and the clergyman's certificate; on the fourth page are blanks for the medical directors and president of the senate. The undertaker's affidavit and clergyman's certificate, as executed, are complete and separate instruments, and are not defective or in any way invalid on their faces. It is true that all of these separate and independent instruments are necessary to complete the proof of death, but in our opinion the undertaker's affidavit and the clergyman's certificate as executed, are as complete and separate instruments as though they were wholly detached from the

1. Forgery; instrument good on its face; extrinsic evidence.

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other papers constituting the proof of death. We do not think that where a certain number of written instruments are required to be presented in connection with each other as indispensable to establish any alleged fact, that a person who falsely and fraudulently makes one or more of these written instruments is guiltless of offense because he does not falsely make all, or because in some of the other written instruments to be presented a discrepancy or defect occurs which prevents the accomplishment of his fraudulent purpose. The undertaker's

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stituting.

affidavit and the clergyman's certificate are in the exact form required, and we think are the subject of forgery, within the terms of the statute. (Sections 129, 139, *supra*.) The fraud of the defendant was not defeated by the form of the forged affidavit, or the forged certificate, but only through an examination of the other written instruments. That these written instruments are connected or attached together, we do not think exculpates the defendant. The case before us is the same as where the invalidity of an instrument depends on some fact not appearing on its face; that is, not appearing upon the face of the forged paper or instrument. (*People v. Galloway*, 17 Wend. 540.)

Complaint is made of the ninth instruction given by the court, to the effect that the crime of forgery is complete when the written instrument is made and forged with a criminal intent. No exception, however, was taken to this instruction by the defendant, and therefore no question is before us concerning the correctness of the instruction for our determination. Complaint is also made of the reception of certain evidence, the giving of certain other instructions, and the refusal of the court to compel the state to elect upon which of the counts of the information it would rely for a verdict. We have examined all of these matters, but we discover no errors in the proceedings affecting prejudicially the substantial rights of the defendant. (Crim. Code, § 293; Wharton's Crim. Plead. and Prac., 8th ed., §§ 285, 290, 293; *Noakes v. People*, 25 N. Y. 330.)

The judgment of the district court will be affirmed.

All the Justices concurring.

JAMES B. CLARK V. THE MISSOURI PACIFIC RAILWAY COMPANY.

1. **RAILROAD WHISTLE**—*Failure to Sound; When Negligence, When Not.* Where a railway company fails to sound the whistle of one of its moving engines, at least eighty rods distant from the place where the engine is to cross a public road or street outside of a city or village, it is negligence toward persons who may be traveling upon that road or street, but is not negligence toward persons who may be traveling on another road or street within the limits of such city or village. (*Mo. Pac. Rly. Co. v. Pierce*, 38 Kas. 61.)
2. ——— *Duty of Person Crossing Track.* Where a person is about to cross a railway track it is his duty to use his senses, and if he does not, and by reason thereof injury results to him from a moving railway train, he cannot recover from the railway company. (*U. P. Rly. Co. v. Adams*, 38 Kas. 427.)
3. ——— *Questions Discussed.* Questions with regard to submitting special questions to the jury, and their findings thereon, and their general verdict, and the judgment of the court upon the special findings, notwithstanding the general verdict, discussed, and held, that no material error was committed by the court.

Error from Miami District Court.

ACTION by Clark against *The Railway Company*, to recover damages for bodily injuries. Trial at the May Term, 1885, when the jury found for the plaintiff, and assessed his damages at \$1. Upon questions presented at the request of plaintiff, the jury answered as follows:

"1. Did the employés of defendant that were operating the train at the time plaintiff received the injuries complained of, blow, or cause to be blown, the whistle on the engine three times, at least 80 rods before crossing the highway on the outside of the city limits of the city of Paola, Miami county, Kansas? A. No.

"2. Did the plaintiff see or know of the approach of the train of defendant in time to have avoided the injury? A. No.

"3. Did the defendant, the Missouri Pacific Railway Company, or any of its employés, blow the whistle three times, at least 80 rods before crossing the highway on the outside limits of the city of Paola, Miami county, Kansas? A. No.

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"4. Was the defendant, the Missouri Pacific Railway Company, guilty of negligence which was the immediate cause of the injury to plaintiff? A. We cannot answer.

"5. (Not given.)

"6. How far is the crossing where the collision occurred, from the place where the highway on the outside limits of Peery's addition to the city of Paola on the east, crosses the railway track of defendant? A. 28 rods, 11 feet.

"7. Was the plaintiff, Clark, warned that the train was approaching in time to have stopped his team and avoided the collision? A. We cannot answer.

"8. Did the defendant's employes managing the train at the time the collision occurred, ring or cause to be rung the bell on the engine at any time after reaching the city limits and before colliding with plaintiff's wagon? A. We cannot answer.

"9. Did the plaintiff, after coming in sight of defendant's track, at any time before arriving at the track, look in the direction from which the train was coming? A. We cannot answer.

"10. Was plaintiff intoxicated at the time the collision occurred on said 15th day of April, 1882? A. We cannot answer."

Special findings upon questions presented at the request of the defendant:

"1. Did the plaintiff, when driving on Locust street and approaching the railroad track, look before he drove on the track to see if a train was approaching on the track from the east? A. We cannot answer.

"2. Did the plaintiff, when traveling along Locust street and near the railroad track, listen to hear if a train of cars was approaching on the road from the east, before he drove on the track? A. We cannot answer.

"3. Could the plaintiff have discovered the approach of the train on the railroad of the defendant, for the distance of seven hundred feet when he got within one hundred feet of the track, if he had looked in the direction from which the train was coming? A. We cannot answer.

"4. Could plaintiff have seen the train approaching on the railway for the distance of one-half mile when he was fifty feet from the track? A. No.

"5. Could the plaintiff have heard the noise of the train

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eighty rods before it reached the crossing of Locust street, if he had listened for its approach? A. We cannot answer.

"6. Did the train make a loud noise as it was approaching the crossing on Locust street? A. We cannot answer.

"7. Was the weather clear and calm at the time of the collision between the engine and plaintiff's wagon? A. Yes.

"8. Was there anything to prevent the plaintiff from seeing the train coming on the track before he drove his horses on the railroad, if he had looked in the direction from which it was coming? A. No.

"9. Could plaintiff have seen the train coming on the track a sufficient length of time to have avoided the collision if he had looked in the direction from which the train was coming? A. Yes.

"10. Could plaintiff have heard the noise of the train a sufficient time to have averted the collision if he had listened? A. We cannot answer.

"11. Was the plaintiff guilty of negligence in driving upon the railroad track without either looking or listening for an approaching train? A. We cannot answer.

"12. Did plaintiff exercise ordinary care and prudence in driving his wagon and team on the railroad track? A. We cannot answer.

"13. Did the plaintiff at any time after he got within two hundred feet of the railroad track, and before he drove his wagon upon the track, look to see if a train was approaching on the railroad from the east? A. No."

Upon the special findings, the court rendered judgment for the defendant. The plaintiff brings the case here.

Stevens & Stevens, and *Brayman & Sheldon*, for plaintiff in error.

W. A. Johnson, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.; This was an action brought by James B. Clark against the Missouri Pacific Railway Company, to recover for injuries alleged to have been caused through the negligence of the railway company. The case was tried before the court and a jury, and the jury found a general verdict in favor of the plaintiff and against the defendant, and assessed

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the plaintiff's damages at one dollar; and also made a large number of special findings, upon which special findings the court rendered judgment in favor of the defendant and against the plaintiff for costs, notwithstanding the general verdict. Of this judgment the plaintiff complains, and brings the case to this court for review.

It appears that on April 15, 1882, at about 6 o'clock in the afternoon, while the plaintiff was crossing the defendant's railway track, going northward on Locust street, in the city of Paola, Kansas, the hind end of his wagon was struck by one of the defendant's engines, which was attached to and was drawing a westward-bound railway freight train, and that this collision caused the injuries complained of.

There are two principal questions involved in this case: First, was the defendant guilty of any negligence causing the injuries complained of? Second, was the plaintiff guilty of any contributory negligence? Both of these questions we think have already been virtually decided by this court in the cases of *Mo. Pac. Rly. Co. v. Pierce*, 33 Kas. 61; and *U. P. Rly. Co. v. Adams*, 33 id. 427.

The only negligence charged against the railway company in this case is, that it failed to sound the engine whistle three times, at least eighty rods east of a certain point where the railway crosses a public road or street at the east edge of the city of Paola, and claimed to be outside of the city limits. The statute does not require that the whistle shall be sounded in a city or village. (Comp. Laws of 1879, ch. 23, § 60.) But it is claimed that the whistle should have been sounded at least eighty rods east of this road or street, for the reason that it was not within the city limits. This road or street was about four hundred and seventy-three feet east of Locust street and of the place where the accident occurred. Now, assuming that the aforesaid road or street was not in the city, and that the whistle was not sounded at least eighty rods east thereof, still these facts, if they are facts, do not necessarily show negligence on the part of the defendant affecting this case. This exact ques-

1. Railroad whistle, failure to sound — when negligence, when not.

Clark v. Mo. Pac. Rly. Co.

tion has already been decided by this court, in the case of *Mo. Pac. Rly. Co. v. Pierce*, first above referred to. The accident in that case happened at the very same place where the accident in this case happened, and in that case it was held as follows:

"The failure of a railroad company to sound the locomotive whistle three times, at least eighty rods from the point where the railroad crosses any public road or street which lies outside of a city or village, is negligence; but such negligence is not attributable to the railway company in a case where the injury complained of was done at a street-crossing within the limits of a city."

Also, in that case, the following language was used in the opinion of the court:

"The purpose of the legislature in requiring this warning to be given before reaching a highway, is manifestly to afford protection to persons or property that may be upon, or passing over such highway, and therefore the omission of the company to comply with this statutory requirement cannot be held to be negligence as to any injury done except at the crossing of the particular highway for which the whistle is required to be sounded. The company owed no duty under this statute to parties crossing Locust street, within the limits of Paola, which is a city of the second class."

We also think that the questions whether, under the facts of this case, the plaintiff was guilty of contributory negligence, and whether such negligence will bar a recovery, have been virtually decided by the case of the *U. P. Rly. Co. v. Adams*, 33 Kas. 427. In that case it was held as follows:

"Where an action is brought to recover for personal injury, and the plaintiff's testimony shows that his own negligence contributed directly to the injury, he has failed to make out a *prima facie* right of recovery, and a demurrer interposed to his evidence should be sustained.

"It is the duty of a person about to cross a railroad track, to make a vigilant use of his senses as far as there is an opportunity, in order to ascertain whether there is a present danger in crossing. A failure to listen, or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals, contributed to the injury."

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The plaintiff was well acquainted with the crossing of Locust street by the railway track. He had lived in that county and near that place for twenty-five years. He had crossed the railway track at that place a great many times, crossing sometimes as often as six times a day. Also, there was a sign put up at that crossing, in plain view, with letters on it saying: "Look out for the cars." He, at the time of the accident, was going north. The train which did the injury was coming from the east. The plaintiff, at one time, when he was at a great distance from the railway track, looked toward the east and toward the railway track, but he did not look toward the east nor toward the railway track at any time after he arrived within 200 feet of the track. During the time while he was approaching the railway track he was looking toward the west. We think the case above cited settles the question that the plaintiff in this case was guilty of contributory negligence, and that he cannot recover.

Of course, presumptively, the general verdict of the jury is a finding of everything in favor of the plaintiff and everything against the defendant; but we know from the special findings of the jury that such was not the intention. We would presume from the general verdict alone, that the jury intended to find that the defendant was guilty of negligence; but from the special findings we know that they did not so intend. Specific questions were put to the jury for the purpose of ascertaining whether the defendant was guilty of negligence, or not, and the jury answered in substance that they could not answer; which was in effect an answer that there was no sufficient evidence introduced to prove negligence on the part of the defendant. And this answer is true. There was no such evidence introduced. It is true there was some evidence introduced on the trial tending to show, and the jury found, that no whistle was sounded eighty rods east of a certain highway claimed to be outside of the city limits; but this evidence and finding merely tended to show negligence on the part of the defendant as toward persons traveling on that highway, and not negligence as to-

2. Duty of person crossing track.

3. Questions discussed.

ward persons traveling on Locust street, in the city of Paola, where this accident occurred. Besides, this finding that the whistle was not sounded, was against the preponderance of the evidence. But taking this finding as it is, still the entire evidence tended to prove and the special findings show that the defendant was not guilty of any negligence as toward the plaintiff in this case. Also, from the general verdict alone, we would presume that the plaintiff was not guilty of any contributory negligence; but the evidence and the special findings of the jury show that he was; hence the special findings and the general verdict are inconsistent with each other, and the special findings must govern. (Civil Code, § 287.) Also, we think the special findings in this respect are sustained by the uncontradicted evidence.

The plaintiff in error also complains that the jury were not required to answer all the special questions of fact presented to them. Now we would think that the court below should have urged the jury more strongly than it did to answer properly all these questions; but still, we cannot say that any material error was committed in this respect as against the plaintiff. The jury failed to answer only four of the questions presented to them at the request of the plaintiff, and upon two of these at least the findings should have been against the plaintiff, and not in his favor; and the other two, under the circumstances of this case, were immaterial. Besides, the court sent the jury out a second time to make findings upon all the questions presented to them. But here the court may have committed a slight error in stating to the jury at that time, among other things, "that if there was any question they could not fairly answer, they might so state." But whatever error the court may have committed in this respect, we do not think that it could have materially prejudiced any of the rights of the plaintiff. It was rather an error against the defendant than against the plaintiff.

We do not think that any material error was committed against the plaintiff, and therefore the judgment of the court below will be affirmed.

All the Justices concurring.

A. L. PETRIE v. S. KARSCH.

JUSTICE'S COURT; Continuance; Correction of Mistake in Entry. A cause pending before a justice of the peace was continued upon the application of one of the parties until January 16, but by mistake the justice made an entry upon his docket that it had been continued until January 15th, and as the plaintiff did not appear on that day, he made an order dismissing the cause. On January 16th the plaintiff appeared, and, after notice to the defendant, procured an order setting aside the judgment of dismissal. *Held*, That the rulings of the justice in correcting his record and setting aside the order of dismissal made before the case was triable, and proceeding with its trial upon the day to which it had been adjourned, was not error.

Error from Sedgwick District Court.

THE opinion states the facts. The defendant *Petrie* brings the case here.

Campbell & Dyer, for plaintiff in error.

W. B. Bailey, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J. : On January 2, 1885, S. Karsch filed a bill of particulars before a justice of the peace of the city of Wichita, demanding judgment against A. L. Petrie for \$87.35, upon which summons was issued, returnable upon the 6th day of January, 1885. On the return-day the case was continued at the instance of the defendant, but whether it was adjourned until the 16th of January, or only until the 15th of the same month, was a matter of dispute. The justice made an entry upon the docket that the case was continued until the 15th day of January, 1885, and on that day, the plaintiff failing to appear, judgment was rendered against him dismissing the cause. On the following day the plaintiff appeared, and finding that a judgment of dismissal had been entered, moved the court to set it aside, and in support of the motion filed an affidavit stating that "on or about the 6th day of January, 1885, he, as plaintiff, went to Justice Hobb's court to try his

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case against A. L. Petrie, defendant; that at the request and upon the testimony of said defendant, the said justice continued the case until Friday, the 16th day of January, 1885; that agreeably to the said order of the said justice, this plaintiff attended the court of said justice on the said 16th day of January, 1885, for the purpose of trying his said case; that thereupon he ascertained that said suit had been dismissed at his cost, on the 15th day of January, 1885, which date was at least one day before the time to which said suit was continued by said justice." Upon this application, which was made with notice to the defendant, the order and judgment of the justice dismissing the cause was set aside. The defendant not being present on January 16th, the cause was continued until the 20th day of January, and notice was given to the defendant of the action of the court in setting aside the judgment of dismissal, and of the time when the cause would be tried. On January 20th, 1885, the defendant failed to appear, and the cause was tried and judgment rendered in favor of the plaintiff. The case was then taken on petition in error to the district court, where the judgment of the justice was affirmed, and Petrie now brings the case here.

The plaintiff in error contends that the justice of the peace erred in setting aside the judgment of dismissal and reinstating the cause upon his docket for trial on the application of the plaintiff, claiming that there is no provision of the statute authorizing him to set aside the judgment and grant a new trial upon any of the grounds stated in the application. The motion to set aside the judgment of dismissal entered on the 15th day of January is not to be treated as an application for a new trial under the provisions of the justices code. Those provisions proceed upon the theory that the verdict or judgment has been given at the time when the cause could be tried. but in this instance it appears that the cause was taken up and disposed of when it was not triable. Although the justice made an entry that the cause had been continued until the 15th day of January, we are bound to assume from the record that the entry was a clerical error, and that the cause was

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actually continued until the 16th of January. The affidavit filed in support of the plaintiff's application, in terms stated that the justice continued the cause until Friday, the 16th day of January, 1885, and that the cause was taken up and dismissed one day before the time to which it had been continued by the justice. The ruling of the justice in allowing the application, supported by the affidavit, is in effect a finding that the facts therein stated were true. It follows, then, that the justice had no authority whatever to try the case without the consent of the parties before the 16th day of January, 1885. He had no more authority to take up and dispose of the case before the day to which it was adjourned, than he would have had to try the case before the day named in the summons for the appearance of the defendant. As the case was actually continued until the 16th day of January, it was proper for the justice, either upon his own motion or upon the application of either party, to correct the record and make it speak the truth with respect to the adjournment, and to set aside and strike from the record the order made upon January 15th, when the cause was not before the justice for disposition. The cause having been adjourned until the 16th day of January, it was the duty of the justice to proceed with the trial upon that day, regardless of the erroneous entry and of the attempted order of dismissal. Upon that day the cause was continued until the 20th of January, and the plaintiff in error was notified of the correction which had been made, and of the time of trial, and he therefore has no cause for complaint.

The judgment of the district court will be affirmed.

All the Justices concurring.

THE EMPORIA NATIONAL BANK V. S. L. SHOTWELL.

PERSON PERSONATING ANOTHER; Indorsement of Draft; Mistake; Liability.

Daniel Guernsey was the owner of a quarter-section of land in Butler county, in this state; he formerly resided in Butler county, but at the time of the transactions hereinafter stated lived in Iowa; an unknown person, assuming the name of Daniel Guernsey, obtained a loan from S. upon the Guernsey land, and executed his notes and mortgages for the loan in the name of Daniel Guernsey; S. sent the amount of the loan by draft by mail to the person executing the notes and mortgages, who said his name was Daniel Guernsey and whose name he then believed to be Daniel Guernsey, and made the draft payable to the order of Daniel Guernsey, intending thereby the person to whom he sent the draft. A bank received this draft for a valuable consideration, in good faith, from the same person to whom it was sent, whom the bank believed to be Daniel Guernsey, and who indorsed the draft by that name. *Held*, Although S. was mistaken and deceived in the transactions, the person he dealt with was the person intended by him as the payee of the draft, designated by the name that he assumed in obtaining the loan, and that his indorsement of it was the indorsement of the payee of the draft by that name; and further *held*, under all the circumstances of this case, as the bank took the draft in good faith and for value, S. cannot recover his loss from the bank.

Error from Butler District Court.

ACTION commenced September 8, 1882, by *S. L. Shotwell* against *The Emporia National Bank*, to recover \$840, with interest. On October 1, 1883, the plaintiff filed in said cause his amended petition, in words and figures following, to wit, (title of cause and exhibits omitted):

"Now comes said plaintiff, and for a cause of action against said defendant says:

"1. Defendant is a corporation duly incorporated under the laws of the United States, and doing business as a banking institution in said state.

"2. Heretofore, to wit, on the 11th day of November, 1881, the Exchange Bank of El Dorado, a corporation duly incorporated under the laws of the state of Kansas, and doing business as a banking institution in the city of El Dorado, Butler county aforesaid, for a valuable consideration to it paid by this

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plaintiff, issued to him a bill of exchange or draft for the sum of \$840, payable to the order of Daniel Guernsey and drawn on the defendant, where the said Exchange Bank had funds to meet that and similar drafts, a copy of which draft is hereto attached, marked 'Exhibit A,' and made a part hereof.

"3. Said draft was by said Exchange Bank delivered to this plaintiff, and by him forwarded in a letter to said Daniel Guernsey, by mail, at Florence, Kansas.

"4. One Noe and W. Hod. Harvey obtained possession of said letter and draft without authority, and forged the indorsement of Daniel Guernsey on the back of said draft, and then presented the same to defendant, and the same was paid, to wit, the sum of \$840, by defendant to said Noe and Harvey, and that amount charged to the said Exchange Bank.

"5. Said Exchange Bank and said Daniel Guernsey have duly transferred and assigned all their interest in and to said draft and the money due thereon, and all rights of action arising therefrom or by reason of all the matters alleged in this petition against defendant to this plaintiff; copies of which are hereto attached and made a part hereof, marked 'B' and 'C.'

"6. Defendant, though often requested, has refused to pay to this plaintiff said draft or said money, or any part thereof, but on the contrary, has charged the same to said Exchange Bank and refused to pay to said Exchange Bank the balance due it without first deducting therefrom the amount of said draft.

"7. By reason of the premises there is due, owing and unpaid from defendant to plaintiff the sum of \$840, with 7 per cent. interest from November 12, 1881.

"Wherefore, he asks judgment against defendant for the sum of \$840, with 7 per cent. interest from November 12, 1881, and costs of suit."

On September 23, 1884, the defendant, having first obtained leave so to do, filed its amended answer. The plaintiff filed his reply, and at the September Term of the court for 1884 the cause was tried by the court, a jury being waived. Upon the attempt of the plaintiff to introduce his evidence, the defendant objected, upon the ground that the petition did not state facts sufficient to constitute any cause of action; and after the plaintiff had rested his case, the defendant filed its demurrer to the evidence, which demurrer was considered by the court, and overruled. Upon the close of the evidence, and

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after the argument of counsel, the court made and filed its findings of fact, as follows:

"1. The Exchange Bank of El Dorado, being a banking corporation doing business at El Dorado, in Butler county, Kansas, on the tenth day of November, 1881, made its draft or check upon the defendant bank, payable at sight, to the order of Daniel Guernsey, for the sum of eight hundred and forty dollars.

"2. At the time of issuing said draft, and at all times thereafter, until the commencement of this action, the said Exchange Bank of El Dorado, had on deposit with the defendant bank, subject to checks, more than the amount of said draft.

"3. The said draft was intended for a certain Daniel Guernsey, who was then a real person and the owner of the N.W. $\frac{1}{4}$ of section 12, township 29 south, range 5 east, in Butler county, Kansas.

"4. The said Exchange Bank delivered said draft to S. L. Shotwell, who delivered the same to C. E. Lobdell, who deposited the same in the U. S. post office at El Dorado, Kansas, in an envelope addressed to Daniel Guernsey, at Florence, Kansas, postage prepaid.

"5. Some unknown person wrongfully obtained possession of said draft and forged the signature of Daniel Guernsey to an indorsement of said draft in blank upon the back thereof.

"6. The said draft never came into the actual possession of said Daniel Guernsey, and he never signed any indorsement thereof, and never authorized the same to be done, nor disposed of the same, except as hereinafter stated.

"7. The unknown person who so forged the signature of Daniel Guernsey to the indorsement upon said draft presented the draft to the defendant bank for payment, and the defendant bank thereupon paid said unknown person for and upon and in payment of said draft the sum of eight hundred and forty dollars.

"8. The person to whom the defendant bank paid the amount of said draft was not the owner thereof, or of any interest therein, and had no authority to collect the same.

"9. Upon the payment of said draft the defendant bank charged the amount thereof to the said Exchange Bank of El Dorado in its account as such depositor, and continues to so charge the same.

"10. Afterward, on the 1st day of March, 1882, the said Exchange Bank of El Dorado demanded of the defendant bank

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that the said sum so charged on account of said draft be restored and allowed as a credit in the deposit account of said Exchange Bank, which the defendant bank refused.

"11. Afterward, the said Daniel Guernsey assigned the said draft and the right to receive payment thereof, and all his right growing out of the issuance of said draft, to the plaintiff, which assignment was in writing, and is the assignment, a copy of which is attached to the plaintiff's petition, marked 'Exhibit C.'

"12. Afterward, the Exchange Bank of El Dorado executed and delivered to the plaintiff an assignment, a copy of which is attached to the plaintiff's petition, marked 'Exhibit B,' that it was the intention of the Exchange Bank of El Dorado, by said writing, to transfer to the plaintiff the sum of money and the right to receive and recover the same so charged by the defendant bank to the said Exchange Bank of El Dorado, in the account of said Exchange Bank of El Dorado, as such depositor with the defendant bank.

"13. No part of said money has ever been repaid, or in anywise allowed, by the defendant bank."

Thereupon the defendant presented and asked the court to make the following additional findings of fact, which the court complied with:

"1. During the year 1881, the plaintiff was engaged in the business of loaning money for a firm in Kansas City, Mo., known as Underwood, Clark & Co.; during this year one C. E. Lobdell, a resident of El Dorado, Kansas, had arrangements with the plaintiff whereby Lobdell was to receive applications for loans upon real estate and give them to the plaintiff, who would forward them to Underwood, Clark & Co., and upon the approval of such applications and the making of the loans, the plaintiff divided the commissions he received on such loans with Lobdell.

"A man by the name of DeTalent, of the firm of DeTalent & Harvey, real estate agents at El Dorado, was appointed inspector by the plaintiff to inspect the real estate on which loans were applied for; the duty of the inspector was to examine the real estate, make report upon its value, its improvements, and the financial standing and condition of the applicant; the duties of Mr. DeTalent were frequently performed by his partner, W. Hod. Harvey, who would make the report and Mr. DeTalent would sign it; the plaintiff and Mr. Lobdell both were aware that Mr. Harvey performed

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these duties and made these reports at different times and upon different occasions.

"2. During the year 1881, a man by the name of Daniel Guernsey owned the N.W. quarter of section 12, township 29, range 5, Butler county, Kansas; this Daniel Guernsey had formerly resided upon this land, but during this year was a resident of the state of Iowa, and the plaintiff had formerly resided in the neighborhood where this land is situated, and knew of Daniel Guernsey and of his owning this land, by reputation and report.

"3. Some time prior to the 11th of November, 1881, C. E. Lobdell received a letter from a man purporting to have been written at Wichita, Kas., in which the man writing it stated that he owned the real estate belonging to Daniel Guernsey, and that he desired to obtain a loan upon it, stating the amount. This letter was signed in the name of Daniel Guernsey. Upon receipt of this letter Mr. Lobdell answered it, inclosing a blank application for a loan; afterward, Mr. Lobdell received another letter, dated at Wichita, written by the same man, returning the application for a loan, filled out, and signed in the name of Daniel Guernsey. This letter was also signed in the same name. The writer of the letter requested Mr. Lobdell, in case the application was accepted, to send the notes and mortgages to him at Florence, Kansas, to be executed by him there.

"4. Upon receipt of this letter and application, Mr. Lobdell gave the application to Mr. DeTalent, to have the land inspected and a report made upon the application; afterward the report was made, written out by Mr. Harvey and signed by Mr. DeTalent; upon receiving this report, Mr. Lobdell gave it and the application for the loan to the plaintiff, who forwarded these papers to Underwood, Clark & Co.

"5. Underwood, Clark & Co. returned to the plaintiff two mortgages and two sets of notes filled out, for the purpose of having them executed; one mortgage was to Underwood, Clark & Co., to secure a sum of \$127.90 according to the conditions of five promissory notes; the other mortgage was to the Scottish American Mortgage Co. (limited), to secure the sum of \$850 according to the conditions of one note; each of these mortgages described the land owned by Daniel Guernsey, and in each of them the name of the maker was inserted as Daniel Guernsey.

"6. The plaintiff, on receipt of these two mortgages and the notes which they were to secure, gave them to Mr. Lob-

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dell for the purpose of having the person who made the application execute them, and Mr. Lobdell forwarded the mortgages and the notes by mail, in a letter addressed to Daniel Guernsey, Florence, Kansas; afterward the mortgages and the notes were returned, signed by the same person who made the application, and signed in the name of Daniel Guernsey, and each of the mortgages had an acknowledgment of the execution, taken before a notary public at Florence, Kansas; accompanying the notes and mortgages was a request that the notes and mortgages should be sent to him by Adams Express, directed to him at Florence, Kansas; the signatures to the application, to each note and to each mortgage, were written by the same person, and the name written was that of Daniel Guernsey.

"7. Upon the receipt of the notes and mortgages, Mr. Lobdell took the mortgages to the register's office to have them recorded, and delivered the notes to the plaintiff; the plaintiff forwarded the notes to Underwood, Clark & Co., and received from them the amount of the loan, which he caused to be placed to his credit with the Exchange Bank of El Dorado.

"8. Mr. Lobdell informed the plaintiff that the party executing the notes and mortgages desired to have the currency sent to him by express to his address at Florence, Kansas; the plaintiff, preferring to send the money in a draft or check, procured a check to be issued to him by the Exchange Bank, a copy of which said check is attached to plaintiff's petition, as 'Exhibit A.' This check when received by the plaintiff was by him delivered to Mr. Lobdell, to be sent to the party executing the notes and mortgages, under the belief that such party was the Daniel Guernsey who owned the real estate described in the mortgages. This belief was induced by the letters written by the party, and by the application which he had made.

"9. Both the plaintiff and Mr. Lobdell acted, in making such loan, under the belief that they were making it to the Daniel Guernsey, the owner of the land described in the mortgages.

"10. The draft shown by 'Exhibit A' to plaintiff's petition was sent by Mr. Lobdell to the address of Daniel Guernsey, at Florence, Kansas, through the U. S. mail; in sending this draft to Daniel Guernsey at Florence, Mr. Lobdell, under the belief that the party executing the notes and mortgages was the Daniel Guernsey who owned the land described in such

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mortgages, intended that the party who had executed the notes and mortgages should never receive such checks.

"11. Neither the plaintiff nor Mr. Lobdell, up to the time for sending such check for such loan, had ever seen either the person who executed the notes and mortgages, or the real Daniel Guernsey.

"12. The only inquiry made by either the plaintiff or Mr. Lobdell, in reference to the party making the application, previous to sending the check, was inquiry made of Hod. Harvey, who claimed to know Mr. Guernsey, and of E. E. Harvey, register of deeds of Butler county, Kansas.

"13. The person who made the application for this loan, and who executed the notes and mortgages, was not the Daniel Guernsey who owned the land described in such mortgages.

"14. The same person who made the application for the loan, and who executed the notes and mortgages, got possession of the letter inclosing the check, and thereby obtained possession of the check.

"15. After the person had obtained possession of this check, he went to Emporia, Kas., accompanied by Hod. Harvey, for the purpose of procuring from the defendant the money upon such check.

"16. On arriving at Emporia, the person having possession of this check presented it to the defendant bank for the purpose of having it cashed, stating to the cashier at the time of such presentation that he was Daniel Guernsey, who was named in said check as the payee thereof, and that the check had been sent to him for a loan which he had negotiated, and for which he had executed notes and mortgages, which had been delivered to the plaintiff; the cashier of the bank being unacquainted with this party, required him to be identified before he would consent to pay the check; a person who was known to the cashier identified Hod. Harvey, who was with the party holding the check, as a man whom he was acquainted with, and whose name was Harvey, and who resided in Butler county, Kansas. Upon this identification, Hod. Harvey stated to the cashier that the man bearing this check was the Daniel Guernsey who was named as payee in the check; that he knew that fact from having knowledge of the fact that this man had executed these notes and these mortgages and delivered them to the plaintiff for such loan. Upon such identification and without any further knowledge as to the facts in the case, the cashier of defendant bank paid to the party holding this

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check the amount of \$840; at the time of the payment of the amount of this check, to wit, on November 14, 1881, the amount paid was charged up to the Exchange Bank of El Dorado, which had issued the check, in the account kept by such Exchange Bank with the Emporia National Bank.

"17. At the time of presentation and payment of this check, the Exchange Bank of El Dorado had to its credit with the defendant bank more than \$2,000, and the charging of the amount of this check to the Exchange Bank by the defendant bank still left the defendant bank owing the Exchange Bank a large amount of money in the account kept by the defendant with the Exchange Bank.

"18. At the time of the payment of this check to the holder of it, the cashier of defendant bank required such holder to indorse his name upon the back of such check before it was paid; thereupon the party in whose possession this check was, wrote across the back of it the name of Daniel Guernsey; the name of Daniel Guernsey upon the back of this check was written by the same party who signed the name of Daniel Guernsey to the application for a loan, to the notes, and to the mortgages.

"19. The real name of the party who executed these notes and mortgages and indorsed this draft is unknown, except as it may or may not be shown by his execution of such notes and mortgages and indorsement of the draft, and the statement made by him and Harvey to the cashier of defendant bank.

"20. Defendant bank has never credited in the account kept by it with the Exchange Bank the amount of this check, which it charged up in such account to the Exchange Bank on the 14th day of November, 1881.

"21. The defendant bank returned this check to the Exchange Bank in December, with a statement showing the account between the two banks for the month of November, 1881.

"22. The first knowledge the plaintiff had that the party who had received this check and got the loan was not the Daniel Guernsey who owned the land described in the mortgage, was in January, 1882, and as soon as plaintiff received information of such fact, he at once notified defendant bank.

"23. In the month of February, 1882, the plaintiff was the cashier of the Exchange Bank of El Dorado, and as such cashier he went to Emporia to see the managing officer of defendant bank and demand of him that the amount of this check,

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which had been charged up to the Exchange Bank, be credited back to it so that the account would stand the same as though such charge had not been made, which request the defendant bank refused to comply with, and it has never at any time credited the amount of this check to the Exchange Bank.

"24. The indorsement made upon the back of this check of the name of Daniel Guernsey, was made without the knowledge or authority of the Daniel Guernsey who owned the real estate described in the mortgages.

"25. The Daniel Guernsey who owned the real estate described in the mortgages knew nothing about this application for a loan, or the making or execution of the notes and mortgages, and the notes and mortgages were executed without his consent.

"26. The Daniel Guernsey who owned the real estate described in the mortgages was not in the state of Kansas at any time during the negotiation for such loan or the making of it.

"27. The plaintiff knew that Mr. Lobdell when he received this check would send it by mail addressed to Daniel Guernsey at Florence, Kansas, in accordance with the request made by the party executing the notes and mortgages, to have the money for such loan sent to him at Florence, Kansas.

"28. The defendant bank in paying the amount of this check to the person holding the same, did so in good faith, under the belief that he was the party to whom such payment should be made, upon the indorsement made by him upon the back of said check.

"29. In the year 1883, each of said mortgages was duly released on the records in Butler county, Kansas, by the mortgagees named in such mortgages.

"30. In the spring of 1882, previous to the commencement of this action, the plaintiff paid to Underwood, Clark & Co. the amount paid by them to him for such loan.

"31. The Exchange Bank executed to the plaintiff the assignment shown by 'Exhibit B,' attached to plaintiff's petition at the time of the date thereof.

"32. The Daniel Guernsey who owns the land described in the mortgages lived at Centerville, Iowa, during the time of all of these proceedings, and was in business then as a clothing merchant, and his name in full is Daniel Guernsey.

"33. The defendant has never accepted such check or draft, or agreed to pay the same, except only as it took the same from the possession of the holder of it, and paid the amount of it to him.

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"34. Since the receipt of the check, shown by 'Exhibit A,' by the Exchange Bank of El Dorado from the defendant bank, the same has never been presented to the defendant bank by the plaintiff, or anyone else, and no demand was ever made upon the defendant bank by the plaintiff in his individual capacity for the payment of such check, and the only demand ever made upon defendant bank by the plaintiff for the Exchange Bank, was the demand above stated."

Thereon the court made the following conclusions of law:

"1. The plaintiff is entitled to recover of the defendant bank the amount of the draft mentioned in the findings of fact, by virtue of the assignment to him executed by Daniel Guernsey.

"2. The plaintiff is entitled to recover of the defendant bank the amount of the said charge mentioned in the findings of fact, by virtue of said transfer and assignment to him, executed by the Exchange Bank of El Dorado.

"3. The plaintiff was not guilty of negligence creating any cause of action or defense against him in favor of the defendant.

"4. Upon the facts, the plaintiff is entitled to recover of the defendant the sum of eight hundred and forty dollars, and interest thereon from the first day of June, 1882, at the rate of 7 per cent. per annum."

On September 30, 1884, the defendant filed its motion for judgment upon the findings of fact, notwithstanding the conclusions of law. This motion was overruled. The defendant then filed its motion for a new trial, which was also overruled. Judgment was entered in favor of the plaintiff and against the defendant for the sum of \$973.30, together with all costs. The defendant excepted to the rulings and judgment of the court, and brings the case here.

C. N. Sterry, for plaintiff in error.

A. L. Redden, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The issues formed by the pleadings in this case were submitted to the court, a jury being waived. At the commencement of the trial the National Bank of Emporia

National Bank v. Shotwell.

requested that the court find the facts specifically, and state its conclusions of law thereon. The bank did not consider the findings of fact first made by the court sufficient upon the questions of law involved in the trial, and therefore asked the court to make additional findings of fact. The court complied with this request. We therefore must consider all of the special findings of fact made by the court, and such findings of fact must be made to harmonize with each other, if possible, and are conclusive upon all disputed and doubtful questions.

The actual name of the person who executed the notes and mortgages and indorsed the draft issued to him by the Exchange Bank of El Dorado is not disclosed in the findings of the trial court; yet, it appears therefrom that such person applied for the loan from Shotwell in the name of Daniel Guernsey; that in his letters he assumed the name of Daniel Guernsey; that he signed the notes and mortgages as Daniel Guernsey; that he indorsed the draft as Daniel Guernsey; that he stated to the cashier of the National Bank at Emporia his name was Daniel Guernsey; and that Harvey, who identified him at the bank, also stated to the cashier that the name of the holder of the draft was Daniel Guernsey. It also appears that Harvey, who inspected the Guernsey land upon the application for the loan and identified the payee of the draft at the bank, claimed to know Daniel Guernsey, and inquiries were made of him by Shotwell in reference to the party making the application previous to sending the draft. If we assume that the real name of the party who indorsed the draft and obtained payment thereof from the National Bank was Daniel Guernsey, although not the Daniel Guernsey who owned the real estate described in the mortgages, the case is very similar to *Maloney v. Clark*, 6 Kas. 82. If, however, it be conceded that the real name of the party who executed the notes and mortgages and indorsed the draft is not Daniel Guernsey, a somewhat different question is presented, but a like result follows; and therefore the judgment is erroneous, for the reason that it is not sustained by the findings of fact of the trial

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court, and is contrary to the law which is applicable thereto. After Shotwell had obtained the draft from the Exchange Bank he delivered it to his agent, Lobdell, to be sent to the party executing the notes and mortgages, under the belief that such party was the Daniel Guernsey who owned the real estate described therein. This belief was induced by the letters written by the person obtaining the draft and the application he had made for the loan. Lobdell sent the draft to the address of Daniel Guernsey, at Florence, through the mail, and in sending the same he intended that the person who executed the notes and mortgages should receive it, then believing such person was the real Daniel Guernsey. Therefore it appears that Shotwell and Lobdell thought the person to whom they sent the draft was the Daniel Guernsey who owned the quarter-section of land upon which the loan was placed by them.

The case of *Robertson v. Coleman*, N. E. Rep., (S. C. of Mass.,) vol. 4, No. 7, p. 619, is an authority directly in point. There, a thief had stolen a team of horses. He went to Boston, and registered his name at the Metropolitan Hotel as Charles Barney. There was living at Swanzey, Mass., a reliable and responsible man of that name. The thief turned the stolen team over to a firm of auctioneers to sell for him, giving his name as Charles Barney. The auctioneers sold the team, and after deducting their commission, gave the thief, calling himself Charles Barney, a check for the balance of the proceeds, the check being payable to the order of Charles Barney. The thief indorsed the check in blank with the name of Charles Barney, and disposed of it to the proprietor of the hotel where he was stopping. Subsequently the auctioneers learned that the team of horses had been stolen, that they had received them from the thief, and that his true name was not Charles Barney. Upon being notified by the auctioneers, the bank upon which the check was drawn refused to pay it. The holder brought suit, and recovered. Judge Field, in delivering the opinion in that case, said :

“The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and

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whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. The plaintiff received this check for a valuable consideration, in good faith, from the same person, whom he believed to be Charles Barney, and who indorsed the check by that name. It appears that the defendants thought the person to whom they gave the check was Charles Barney, of Swanzey, a person in existence.

"It is clear, from these facts, that although the defendants may have been mistaken in the sort of man, the person they dealt with was the person intended by them as the payee of the check designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value."

So, in this case, Shotwell, for the notes and mortgages received by him, sent the draft to a person who said his name was Daniel Guernsey, and whose name Shotwell believed to be Daniel Guernsey, and Shotwell made the draft payable to the order of Daniel Guernsey, intending thereby the person to whom he sent the draft. The National Bank of Emporia received this draft for a valuable consideration in good faith from the same person whom the bank believed to be Daniel Guernsey, and who indorsed the draft by that name. When the holder of the draft presented it to the National Bank for the purpose of having it cashed, he stated that he was the Daniel Guernsey who was named in the draft as the payee thereof, and that the draft had been sent him for the notes and mortgages which he had delivered to Shotwell. Harvey, who identified the holder of the draft at the bank, stated to the cashier that he knew that such holder was Daniel Guernsey "from having knowledge of the fact that this man had executed certain notes and mortgages and delivered them to Shotwell for a loan." This is not like a case where a draft falls into the hands of the person by theft, for which the party sending is not responsible. It appears that Shotwell thought

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the person to whom the draft was sent was the real Daniel Guernsey who owned the land in Butler county, and the false Daniel Guernsey did not obtain the letter sent him containing the draft by theft from the mail. Shotwell and Lobdell dealt with the false Daniel Guernsey as though he were the real Daniel Guernsey. Such person, it is true, obtained the draft from Shotwell by fraudulent letters and representations, but the National Bank is not responsible for the letters and representations of the false Daniel Guernsey, and as it took the draft in good faith and for value, it cannot be holden for the conversion of it, nor is it liable for the return of the money which it paid to the holder thereof upon his indorsement. The National Bank of Emporia paid the draft to the person to whom it was sent by Shotwell, and such person received the money from the bank thereon.

Person personat-
ing another;
indorsement of
draft; mistake;
liability.

Counsel for Shotwell claims that the National Bank did not use sufficient care and diligence in having the payee of the draft identified. This is not important, under the circumstances presented. The vital point in this case is, that Shotwell intended the draft to be sent to the party executing the notes and mortgages, and intended it to be paid to the person to whom he sent it and whom he designated by the name of Daniel Guernsey, because that was the name which he assumed in executing the notes and mortgages; and therefore the National Bank is protected in paying the draft to the very person whom Shotwell intended to designate by the name of Daniel Guernsey. Counsel also comments upon the fact that he refused to send currency to Florence, as requested, but sent, instead, the draft, payable to the order of Daniel Guernsey. If it were not for the other facts, this finding might tend to show caution and prudence on the part of Shotwell, but as all of the findings must be considered together, it may be that Shotwell "preferred to send the money in the way of a draft" as a matter of convenience only.

Counsel for Shotwell claims that *Dodge v. Bank*, 30 Ohio St. 411, is decisive in favor of his client. The court in that

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case recognized the exact ruling and principle decided in this, but refused to apply it to that case, because the facts did not seem to warrant its application. The court said in that case that the bank paying the check upon the forged indorsement "had the right to show, if it could, that the person to whom the check was delivered was in fact the person whom the drawer intended to designate by the name of Frederick B. Dodge." In that case the drawer of the check refused to recognize the person presenting the voucher for which the check was given as the owner, without proof of identity, and for that reason made the check payable to the order of Dodge, the owner of the voucher. In this case the draft was sent to a false Daniel Guernsey, under the belief that he was the real Daniel Guernsey, and it was the intention of Shotwell and his agent, Lobdell, that the person who had executed the notes and mortgages should receive the draft sent by them.

It was said in argument that the trial court decided this case upon the authority of *Kohn v. Watkins*, 26 Kas. 691. That case is no authority for the decision. There, the draft was sent by Watkins to his correspondent, McLain, to be delivered to the payee thereof, Michael A. Becker. McLain forged the name of Becker upon the draft, then indorsed his own name thereon and negotiated the same. The draft was never delivered as Watkins had given instructions. He never intended it to be paid to McLain, to whom it was sent. McLain, the correspondent, was solely responsible for the fictitious application and the forgery. It is true that there is some resemblance between the case at bar and the cases of *Dodge v. Bank* and *Kohn v. Watkins*, yet an examination of these cases shows a fine distinction in each, and such a distinction that neither of the latter cases controls the decision of the former.

Upon the findings of fact of the trial court, the judgment must be reversed, and the cause will be remanded with the direction for the court below to render judgment in favor of the plaintiff in error.

All the Justices concurring.

THE STATE OF KANSAS V. ISRAEL LONGTON.

INFORMATION—Waiver of Defects. Where a criminal warrant is issued upon an information charging the defendant with selling intoxicating liquors in violation of law, and the defendant, without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, enters into a recognizance for his appearance at the next term of the court, and is thereby discharged from arrest, he waives any supposed defects or irregularities in the issuing of the warrant without a sufficient verification of the information, and cannot afterward for that reason and upon motion have the warrant quashed or set aside.

Appeal from Cloud District Court.

PROSECUTION for a violation of the prohibitory liquor law. The defendant *Longton* appeals. The opinion states the case.

L. J. Crans, for appellant.

S. B. Bradford, attorney general, for The State; *Edwin A. Austin*, of counsel.

The opinion of the court was delivered by

VALENTINE, J.: This was a prosecution upon a criminal information filed in the district court of Cloud county, on October 22, 1885, charging the defendant, Israel Longton, with selling intoxicating liquors in violation of law, and without first taking out and having a permit authorizing him to make such sales. The information contained two counts, and was verified by the county attorney upon information and belief, and by the affidavit of another person, filed with the information, and this affidavit was sworn to positively, and was a sufficient verification of all the material allegations of the information, except that the defendant made the unlawful sales complained of "without first taking out and having a permit therefor." Upon this information, and on October 23, 1885, a warrant was issued for the arrest of the defendant. On October 24, 1885, he was arrested, and on the same day entered into a recognizance for his appearance at the next term

35	375
47	730
35	375
49	145
35	375
51	791
35	375
54	231
35	375
76	657

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of the district court, and was discharged from the arrest. On October 26, 1885, the warrant was returned to the district court. On February 17, 1886, the case was called for trial, and the defendant then filed a motion to set aside and quash the warrant, and that he be discharged without day. This motion was overruled. The defendant was then arraigned, but refused to plead, and the plea of "not guilty" was entered for him. He was then tried before the court and a jury, and was found guilty under the second count of the information and not guilty under the first count, and was sentenced to imprisonment in the county jail of Cloud county for the term of forty days, and that he pay a fine of \$125 and the costs of the prosecution. From this sentence he appeals.

The only grounds urged in this court for a reversal of the sentence and judgment of the court below, are that the information was not properly verified, and therefore that the warrant was improperly issued; that the defendant was wrongfully arrested thereunder, wrongfully required to enter into a recognizance for his appearance at court, and wrongfully tried upon the information. The case of *The State v. Gleason*, 32 Kas. 245, is relied on by the defendant as decisive of this case in his favor. He also cites the following cases: *In re Lewis*, 31 Kas. 71; *The State v. Blackman*, 32 id. 615; *The State v. Brooks*, 33 id. 708, 712; *The State v. Goodwin*, 33 id. 538. None of the authorities cited by the defendant goes to the extent which he claims, and some of them are directly opposed to what he claims. See also the case of *The State v. Bjorkland*, 34 Kas. 377, which enunciates doctrines which we think require a decision in this case adverse to the defendant. The defendant was not under arrest at the time he made his motion to set aside the warrant and to be discharged. The warrant had long before that time spent its force and had been returned by the sheriff to the court, and so far as the warrant was concerned, the defendant had a right to go when and where he pleased. Of course the defendant was under recognizance to appear at court, but he made no motion to set aside the recognizance. Besides, he

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probably could not have had it set aside even if he had made the motion, for this court has decided, in both the Blackman case and the Bjorkland case, *ante*, that the verification of an information by the county attorney upon information and belief is sufficient for all purposes, except for the purpose of issuing a warrant for the arrest of the defendant. We think when the defendant entered into a recognizance for his appearance at court, without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, he waived the supposed defects in the verification of the information and the irregularity in issuing the warrant without a sufficient verification.

The judgment of the court below will be affirmed.

All the Justices concurring.

In the Matter of the Petition of JOHN W. GRIFFITH, for a Writ of Habeas Corpus.

1. **BEGINNING OF PROSECUTION; Statute of Limitations.** The mere filing of a complaint before a magistrate charging the commission of a felony upon which no warrant is issued nor arrest made, is not such a commencement of the prosecution as will take the case out of the operation of the statute of limitations.
2. ——— **Statute of Limitations.** Imprisonment in the state penitentiary does not fall within any of the exceptions of the limitations upon criminal prosecutions; and therefore the time of imprisonment of the accused within the state, which passes before a prosecution is begun, cannot be excluded from the statutory period of limitation.

Original Proceedings in Habeas Corpus.

PETITION for a writ of *habeas corpus*, filed in this court April 8, 1886, by *John W. Griffith* against *S. L. Jones*, as sheriff of Sumner county. The opinion herein was filed at the June, 1886, session of the court.

35	377
52	447
35	377
56	723
35	377
72	245
35	377
75	255

W. P. Hackney, for petitioner.

S. B. Bradford, attorney general, for respondent.

The opinion of the court was delivered by

JOHNSTON, J.: This is an application for a writ of *habeas corpus*, in which John W. Griffith represents that he is restrained of his liberty by S. L. Jones, sheriff of Sumner county, without authority of law. It appears that the petitioner is held in custody on a warrant charging him with forgery, which was issued by L. A. Sumner, a justice of the peace of the city of Wellington, on the 10th day of March, 1886. The warrant was not issued upon a complaint made to that magistrate, but was founded on a complaint made and filed on September 4, 1883, before D. N. Coldwell, who was at that time a justice of the peace of the city of Wellington. This complaint was made and filed in his office, and was turned over by him with the other papers in his office as justice of the peace, to the said L. A. Sumner, who was his successor in office, and the complaint has been retained in the office and custody of Sumner ever since that time. No warrant was ever issued upon this complaint by Coldwell nor by Sumner before the issuance of the one under which the defendant is now held in custody. It further appears that on the 12th day of September, 1883, the petitioner was arrested, tried and convicted upon a charge of forgery, and sentenced to the penitentiary for a term of three years. On March 23, 1886, he was pardoned by the governor and restored to his liberty, but was immediately arrested and taken into custody by the respondent upon the process under which he is now held.

Under these facts the petitioner contends that the prosecution for the offense with which he is charged, is barred by the statute of limitations. Looking only at the recitation in the warrant with regard to the time when the offense was committed, there would seem to be no doubt that the statute bars the prosecution, because more than two years had elapsed after the offense was committed before the issuance of the warrant

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and the arrest of the petitioner; but it is insisted on the part of the state that the making and filing of the complaint on September 4, 1883, is a commencement of the prosecution within the meaning of the statute of limitations, and prevents the bar under the statute. The question presented then is, does the making and filing of a complaint charging the de-

1. Beginning of prosecution; statute of limitations. fendant with a felony, and upon which no warrant is issued nor arrest made, constitute the commencement of the prosecution within the meaning

of the statute of limitations? We think not. While the legislature has defined what shall be deemed the commencement of a civil action, it has nowhere provided what shall constitute the commencement of a criminal prosecution. "The first pleading on the part of the state is an indictment or information." (Crim. Code, § 102.) It was conceded in argument that the presentation or filing of an indictment or information was the commencement of a prosecution, but the filing of a mere complaint before a magistrate charging the commission of a felony cannot be so regarded. Neither the preliminary examination nor the prosecution is founded upon the complaint. As has been decided: "The original complaint has spent its force when the order of arrest is issued, and the order of arrest is the foundation for the preliminary examination." (*Redmond v. The State*, 12 Kas. 172.) The complaint is the initiative step to determine whether a prosecution shall be commenced, and the warrant does not necessarily follow the making and filing of the complaint, as is the case where an indictment or information is filed. Section 36 of the criminal code provides that the magistrate to whom a complaint is made "shall examine on oath the complainant and any witness produced by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed, the court or justice shall issue a warrant." After this investigation is made by the magistrate and the complaint is reduced to writing and sworn to, no warrant is issued unless it shall then appear to him that an offense has been committed. If the war-

In re Griffith, Petitioner.

rant is issued, it is not made returnable before the magistrate issuing it, but it recites that the officer shall arrest the accused and take him before some magistrate of the county, to be dealt with according to law. The officer making the arrest may take the accused before any magistrate of the county, and is not limited to the one with whom the complaint is lodged, and the preliminary examination will be conducted without regard to the complaint upon the warrant returned before such magistrate. (*Redmond v. The State*, supra; *Evans v. Thomas*, 32 Kas. 469.)

It would be unreasonable to hold that the mere filing of a paper or complaint, which is not regarded as a pleading, is not the foundation of either the preliminary examination or the prosecution, and upon which a warrant may never be issued, is a commencement of the prosecution sufficient to take it out of the statute of limitations. Statutory limitations upon the prosecution of crimes are to be reasonably and liberally interpreted with a view to accomplish the purpose they are intended to promote. The policy of the law is, that the accused shall have a prompt and speedy public trial before the proofs of his guilt or innocence have been obliterated. This purpose would not be accomplished by holding that the filing of a complaint alone operated as a bar to the statute, because complaints might be lodged before magistrates upon which no warrants would issue or arrests be made, and of which the public, as well as the accused, would have no knowledge until such time as interested persons might cause warrants to be issued and arrests to be made. If this were permitted, prosecutions for supposed offenses could thus be kept alive and delayed indefinitely, and the accused who at first was prepared with the proofs of his innocence, might, after the period of limitation fixed by the law, be lulled into a sense of security, and fail to preserve such proofs; and when a warrant is issued long after the statutory limitation, as was done in this case, he might, by reason of the delay, be entirely unprepared to meet the charge.

The cases cited by the state do not bear out its contention.

In *State v. May*, 1 Brev. 124, the question of whether an information to a magistrate is a legal commencement of a prosecution was in the case, but the decision of the reviewing court was placed upon other grounds. And even the inferior court ruled that a prosecution commenced by an information to a magistrate might be deemed a legal commencement where it was *pursued with due attention afterward*. The other citation made is *State v. Miller*, 11 Humph. 505, and it does not support the claim of the state that the filing of a complaint is the commencement of a prosecution, but it is there held that the warrant, apprehension and requiring of bail for the appearance of the party at the circuit court constituted a prosecution of the offender, and of this prosecution the warrant is the commencement. We are clear that the filing of a complaint only will not prevent the bar of the statute, and we are inclined to the view that "the issuing of the warrant in good faith and delivery to an officer to execute, is a sufficient commencement, if it appears that the defendant was afterward arrested upon that warrant and bound over for trial." (*People v. Clark*, 33 Mich. 120.)

It is further claimed in behalf of the state, that the time when Griffith was incarcerated in the state penitentiary should be excluded from the period of limitation. There is no ground whatever for this claim. The only exceptions to the statute are those mentioned in § 33 of the criminal code, and imprisonment in the penitentiary does not fall within any of them. He was of course not absent from the state, nor did he conceal the fact of the crime; neither can it be said that he concealed himself so that process could not be served upon him. He was convicted and imprisoned by the state, and of necessity the state and its officers were acquainted with his whereabouts.

The prosecution of the offense charged against the prisoner not having been begun within two years after the commission of the offense, and not falling within any of the exceptions of the statute of limitations, is barred by that statute, and the petitioner must therefore be discharged.

All the Justices concurring.

35	388
36	384
35	382
41	753
35	382
43	326
35	392
57	331
35	382
163	767
35	382
166	49

J. C. STOUT V. KERSEY COATES, *as Assignee of the Mastin Bank.*—F. KIRKBRIDE V. KERSEY COATES, *as Assignee, &c.*

1. **IRREGULARITY in Tax List and Publication Notice.** Where a tax list and the accompanying notice for publication are not made out by the county treasurer between the first and tenth of July, as required by § 106 of chapter 107, Comp. Laws of 1879, but are made out in ample time for the list and accompanying notice to be published as prescribed by § 107 of said chapter 107, the delay is a mere irregularity only, and is fully cured by the provisions of § 139 of said chapter 107.
2. **IRREGULARITY; Affidavit of Publication.** Where a tax list and accompanying notice are properly published for the requisite length of time required by the statute, and the printer publishing the list and notice makes an affidavit thereof, as prescribed by § 108 of said chapter 107, and such affidavit is filed with the county clerk, to be preserved by him, the failure or omission of the county treasurer to make another affidavit of the printing of the list and notice, in accordance with the provisions of said § 108, is only an irregularity, and will not affect fatally the tax proceedings.
3. ——— **Tax-Sale Certificate; Recital.** A recitation in a tax-sale certificate that a deed of the premises therein described will be due to the purchaser a day or two too soon, will not invalidate a tax deed issued upon the tax sale, if all the other tax proceedings are regular, and if three years have fully expired from the day of sale before the issuance of the tax deed.
4. **REDEMPTION LIST, Not Posted; Tax Deed.** The posting up of the redemption list and notice required by the provisions of § 137 of said chapter 107 cannot be omitted, and if omitted, the failure to comply with the provisions of the statute in that regard will be fatal to the tax deed, if challenged before the statute of limitations has full operation thereon.

Error from Wyandotte District Court.

Two actions in the nature of ejectment, brought by *Kersey Coates*, as assignee of the Mastin Bank, to recover certain lots in Kansas City, Kansas. Trial by the court, and judgment for plaintiff in each case, January 30, 1885. The defendants bring the cases here. The opinion states the material facts.

Hutchings & Keplinger, for plaintiff in error Stout; *Hale & Miller*, for plaintiff in error Kirkbride.

A. Smith Devenney, for defendant in error; *H. L. Alden*, of counsel.

The opinion of the court was delivered by

HORTON, C. J.: These were actions in the nature of ejectment, to recover eight lots situate in Kansas City, in this state. Kersey Coates, as assignee of the Mastin Bank, claims the original title to all these lots through conveyances from the government. J. C. Stout bases his title and right of possession to lot 248 on Wood street, lot 241 on James street, and lots 246, 248, 250, 252 and 260 on Armstrong street, upon seven tax deeds executed by the county clerk of Wyandotte county on September 7, 1881, and recorded the same day in the office of the register of deeds of that county. These lots were sold for taxes on September 4, 1878, for the delinquent taxes of the year 1877. F. Kirkbride bases his title and right of possession to lot 245 on Wood street upon two certain tax deeds executed by the county clerk of Wyandotte county. One of the tax deeds, for the north three-fourths of said lot, is dated September 18, 1880, and was recorded September 25, 1880. The tax sale upon which this deed is based was made September 6, 1877, for the delinquent taxes of the year 1876. The other tax deed, for the south one-fourth of said lot, is dated September 26, 1882, and was recorded the same day. The sale upon which this tax deed is based was made September 2, 1879, for the delinquent taxes of the year 1878. Trials had before the court, juries being waived.

The court filed in each case its conclusions of fact, and thereon its conclusions of law. It decided that there were such errors in the tax proceedings that all the tax deeds were invalid, and rendered judgment in favor of Coates, as assignee, for the recovery of the premises in controversy, saving to the defeated claimants under the tax title the taxes with all interest and costs as allowed by law, and also all their rights

Stout v. Coates, *Assignee*.

as occupying claimants. They excepted, and bring the cases here.

The cases involve the same questions. All the tax deeds appear to be valid upon their faces, and having been duly acknowledged, are *prima facie* evidence of the regularity of all the tax proceedings. It is claimed, however, that certain alleged fatal defects appear in the tax proceedings, and that thereby the holders have no title to the premises therein described. We will notice, in their order, these supposed defects.

First, it is claimed that the tax lists and accompanying notices for publication, as required by § 106, of chapter 107, Comp. Laws of 1879, were not made out between the first and tenth of July in each year. This is only a mere irregularity, and is cured by § 139 of said chapter 107, which provides, among other things, that—

1. Irregularity
in tax lists
and publica-
tion notice.

“No mere irregularity of any kind in any of the proceedings shall invalidate any such proceeding or the title conveyed by the tax deed; nor shall any failure of any officer or officers to perform the duties assigned him or them, upon the day specified, work an invalidation of any such proceedings or of said deed.”

The tax lists were dated July 25, 1877, July 25, 1878, and July 23, 1879. The findings are that these lists and accompanying notices “were published in a newspaper published and of general circulation in Wyandotte county, the requisite length of time before the sales.” The statute, therefore, was substantially complied with.

The second irregularity alleged in the tax proceedings is that the treasurers did not file affidavits of the printing of the lists of delinquent taxes in addition to those made by the printers, which were filed as required by § 108 of said chapter 107. This section reads:

“Every printer who shall publish such list and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication, made by such person to whom the fact of publication shall be known; and no printer shall be paid for such publi-

Opinion of the Court.

cation who shall fail to transmit such affidavit within fourteen days after the last publication. The county treasurer shall also make, or cause to be made, an affidavit or affidavits of the printing of such list and notice as above required; all of which shall be carefully preserved by him, and deposited as hereinafter specified."

The court's findings show that not only were the lists and notices properly published, but they also show that the printers publishing the same made affidavits thereof, and that the same are on file in the proper office. The omission of the treasurers to file the additional affidavits of the printing of such lists and notices, as required by said § 108, under these circumstances, we do not regard as such an irregularity as to affect the validity of the tax deeds.

The third alleged irregularity is that the tax-sale certificates recite too short a time within which the purchasers at the tax sales would be entitled to tax deeds. These tax certificates could not have misled anyone. Such certificates go to the purchaser—not to the original owner; and if three years expired before the issuance of the tax deeds, the irregularity in the tax certificates will not invalidate the tax deeds.

The other defect claimed in the tax proceedings is that the redemption notices were not posted, as required by § 137 of said chapter 107. Said section, among other things, provides that the county treasurer, four months before the expiration of the time limited for redeeming lands sold for taxes, shall cause to be published in some paper of general circulation in his county, once a week for four consecutive weeks, a list of all unredeemed lands and town lots. He shall also cause to be posted, for the same length of time, such list and notice in at least four public places in the county, one of which shall be in some conspicuous place in his office. The court specially found as a fact, that copies of the redemption notices and lists were posted in the office of the county treasurer of Wyandotte county prior to the execution of the tax deeds as required by

Stout v. Coates, Assignee.

law, but further found that copies of said notices and lists were not posted up at the other public places in said county, as prescribed by the statute. A motion was filed to set aside this finding, upon the ground that it was wholly unsupported by the evidence. The tax deeds being regular upon their faces, are *prima facie* evidence of the regularity of all proceedings, from the valuation of the land by the assessor inclusive, up to the execution of the deeds, and therefore are *prima facie* evidence that the redemption lists and notices were properly posted up. It was incumbent upon Coates, as holding the affirmative of the issue, to prove that the statute had not been complied with; and unless it affirmatively appeared from the evidence that the notices were not posted, the presumptions are that they were posted. The special finding that the redemption notices and lists were not posted embraces all the lots. There is in the record some slight evidence that the redemption list and notice of the north three-fourths of lot 245 on Wood street were not properly posted up in 1880; but as to the redemption notices for 1881 and 1882, the evidence does not sustain the finding of the court. William Albright was the county treasurer in 1881 and 1882 of Wyandotte county. He testified that the redemption lists and notices were sent out to be posted, as required by the statute; that his deputy at the time attended to sending out these notices; and that he knows, as a matter of fact, the notices were sent out. His deputy was not called to give any testimony. As the law makes the tax deeds *prima facie* evidence that the notices were posted, the evidence is insufficient to show they were not posted in 1881 and 1882. If there had been a separate special finding that the redemption notice and list were not posted up in 1880, we might, perhaps, permit the finding to stand so as to overturn the tax deed of September 18, 1880; but as the finding of the year 1880 includes also other years, and as there is no evidence whatever to support such a finding taken as a whole, we must decide that the finding is erroneous and without support. Upon another trial, we suppose the matters herein re-

ferred to will be more carefully and fully investigated, and all the facts thereof clearly developed.

In conclusion, we should say that the posting up of the redemption list and notice required by the provisions of § 137 of said chapter 107 cannot be omitted, and if omitted, the failure to comply with the provisions of the statute in that regard will be fatal to the tax deed, if challenged before the statute of limitations has full operation thereon. (*Long v. Wolf*, 25 Kas. 522.)

As the facts in these cases have not been agreed to by the parties, and as certain findings of fact of the trial court are against the evidence, we cannot direct judgment to be entered in the premises. (Civil Code, § 559.)

The judgments of the district court will be reversed in both cases, and the causes remanded for new trials.

All the Justices concurring.

35 387.
50 386.

THE STATE OF KANSAS V. LOUISA BURNS.

1. **INTENT, Evidence to Show.** Where a person is charged under § 253 of the act regulating crimes and punishments with willfully disturbing the peace and quiet of another person and his family, and the county attorney relies for a conviction upon the conduct of the defendant on a particular day, previous conduct of the defendant of a similar character, in connection with other facts, may be shown for the purpose of showing that the conduct of the defendant on the particular day was willful.
2. **CONVICTION, When Sustained.** And where such conduct is directed primarily against some person other than the prosecuting witness and his family, and is wrongful and willful, and the natural and necessary consequence of such conduct is to disturb the peace and quiet of the prosecuting witness and his family, and this the defendant knows, a conviction will be sustained.

Appeal from Washington District Court.

PROSECUTION under § 253 of the crimes act. From a conviction at the November Term, 1885, the defendant *Burns* appeals. The facts sufficiently appear in the opinion.

Lowe & Smith, for appellant.

Omar Powell, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This is a criminal prosecution under § 253 of the act regulating crimes and punishments, Comp. Laws of 1879, ch. 31, § 253—in which it was charged as follows:

“On the 23d day of September, 1885, in the county of Washington and state of Kansas, one Louisa Burns did then and there unlawfully and willfully disturb the peace and quiet of one Silas Blodgett and of the family of said Silas Blodgett, by making loud and boisterous noises and by uttering profane and vulgar oaths, and by rude and indecent behavior, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas.”

The action was commenced before a justice of the peace, where the defendant was found guilty, and sentenced. She then appealed to the district court, where she was again found guilty, and was sentenced to pay a fine of \$10, and to pay the costs of the prosecution; and from this sentence she now appeals to this court.

The statute under which she was convicted reads as follows:

“SECTION 253. Every person who shall willfully disturb the peace and quiet of any person, family or neighborhood, shall, upon conviction thereof, be fined in a sum not exceeding \$100, or be imprisoned in the county jail not exceeding three months.”

The defendant, who is the appellant, presents only two questions to this court, which are stated by her counsel as follows:

“*First*, Appellant claims that the court erred in allowing the county attorney to make statements to the jury of other of-

Opinion of the Court.

fenses than the one charged, and in admitting evidence to sustain those offenses.

"*Second*, That the court erred in refusing to give the instruction asked by her and in modifying it and giving it as modified."

We do not think that these claims of error are tenable. *First*, The uncontradicted evidence introduced on the trial showed that the defendant was guilty beyond all reasonable doubt, and therefore the above supposed errors, if errors, are immaterial. *Second*, The court below did not commit error in any of the respects above mentioned.

The "other offenses than the one charged," mentioned by the defendant's counsel in his first assignment of error, are offenses of a character similar to the one intended to be charged, and were committed by the defendant from one to three days prior to the commission of the one intended to be charged, and are offenses of which she might have been found guilty under the allegations of the charge. Besides, the statements made by the county attorney and the evidence introduced by him concerning these other offenses were made and introduced for the purpose of showing that the acts committed by the defendant on September 23, 1885, and claimed by the county attorney to constitute the offense charged, were not innocently or rightfully committed, but were *willfully* and unlawfully committed. We think that for the purposes of a conviction the proof of these other offenses was unnecessary, but still, as this proof and the facts connected therewith tended to prove the *willfulness* of the acts committed by the defendant on September 23, 1885, and which acts the county attorney claims constitute the offense which he intended to charge against the defendant, we think the proof of such other offenses was not wholly irrelevant. Indeed, we think that such proof was competent and relevant, though probably unnecessary. (*The State v. Folwell*, 14 Kas. 105; *The State v. Adams*, 20 id. 311, 319.) Besides, in misdemeanor cases such as this, evidence of separate and distinct offenses may be introduced in evidence, provided each offense

1. Competent evidence to show intent.

The State v. Burns.

is fairly charged within the terms of the complaint — the defendant simply having the right at the close of the evidence for the prosecution, to require the prosecution to elect upon which offense it will rely for a conviction. (*The State v. Schweiter*, 27 Kas. 500, 512; *The State v. Crimmins*, 31 id. 376, 379, 380.)

The defendant asked the court to instruct the jury as follows:

“In this case the defendant, Louisa Burns, is charged with willfully disturbing the peace of one Silas Blodgett and his family, in the county of Washington and state of Kansas, on the 23d day of September, 1885. Before you can find the defendant guilty, the evidence must be such as satisfies your minds beyond a reasonable doubt that the defendant did at the time and place charged intentionally and purposely disturb the peace and quiet of Silas Blodgett or his family. And for the purpose of conviction it is not sufficient for the state to show by the evidence that the peace and quiet of said Blodgett and his family were disturbed by the acts or conduct of defendant, but the evidence must be such as convinces your judgment that defendant purposely and intentionally did the acts complained of with a view of so disturbing the peace and quiet of said Blodgett or his family.”

The court gave the above instruction, and then, as an addition thereto, gave the following:

“Although the words and acts of the defendant may have been primarily directed against some person other than Blodgett or his family, yet if the defendant’s words and acts were wrongful and willful, and the natural and necessary consequences of them were the disturbance of Blodgett and his family, the defendant is equally guilty as though she had no other intention than the disturbance of Blodgett and his family. The defendant is presumed to be innocent until her guilt is established by the evidence to your satisfaction beyond a reasonable doubt.”

It is this addition to the defendant’s instruction of which she really complains. We think, however, it is correct. It is probably true that the objectionable words and acts of the defendant were directed primarily against a man who had formerly been her

2. Correct charge; conviction sustained.

French v. Wade.

husband; but it is also true, in all probability, that he was not the only person whom she wished to annoy. Blodgett and his family kept a boarding-house, and her former husband took his meals there, and evidently the defendant desired to annoy Blodgett and his family, as well as her former husband. She in fact annoyed Blodgett and his family, and their boarders, and all the neighborhood around. And this she knew, for Blodgett and others had so informed her on previous occasions, to wit, September 20th and 22d, 1885, when she was guilty of other unlawful conduct of a similar character. The proof and statements of these previous occasions are the matters of which the defendant complains in her first assignment of error.

The judgment of the court below will be affirmed.

All the Justices concurring.

DAPHNEY FRENCH, *et al.*, v. H. A. WADE.

1. AGENT—*Evidence of Authority.* While an agent may testify under oath as to his authority to act for the principal, the mere declarations of one who professes to be an agent are not competent evidence to establish his agency.
- 2 EVIDENCE; *Communications between Husband and Wife.* The plaintiff caused the deposition of one of the defendants to be taken prior to the trial in which the witness gave testimony concerning communications had with her husband during the marriage, and prior to his death. *Held,* That the testimony falls within the prohibition of the code which forbids husband or wife "to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted, or afterwards," and its admission over the objection of the defendants was error. (Civil Code, § 323.)

Error from Labette District Court.

THE opinion contains a sufficient statement of the facts. Trial at the May Term, 1884, and judgment for plaintiff *Wade*. The defendants bring the case here.

35	391
38	106
39	130
39	370
35	391
49	631
35	391
52	48
52	423
35	391
71	111

Perkins & Morrison, for plaintiffs in error.

The opinion of the court was delivered by

JOHNSTON, J.: The averments in the amended petition filed by the plaintiff below, who is defendant in error here, were, in substance, that on the 20th day of December, 1874, Peter French sr. was the owner of lot 16 in block No. 3, in the city of Parsons, and that about that time he and his wife Daphney French, through James W. French, who was their duly-authorized agent for that purpose, entered into a verbal agreement to sell the lot to the plaintiff Wade for the sum of \$375, which sum was to be paid by the plaintiff within a reasonable time thereafter upon the execution and delivery to him of a good and sufficient deed to the premises. A part of the alleged agreement was that Wade might enter and take possession of the lot upon payment of the purchase-money; and it was averred that on March 15, 1875, and within a reasonable time after the making of the agreement, he paid to Peter French sr. the full amount of the purchase-money, and demanded a deed of general warranty to the lot. He states that upon the payment of the purchase-money he took possession of the lot under the agreement, and has retained the same ever since, and that during that time he has expended the sum of \$400 in making valuable and permanent improvements thereon. It is further alleged that after the making of the verbal agreement, the payment of the purchase-money, and the taking of possession by the plaintiff, Peter French sr. and Daphney French, by James W. French, their agent authorized by parol, executed and delivered to the plaintiff their written contract for the sale of the lot, a copy of which is set out, and is in form an absolute conveyance. It is further averred that on October 17, 1876, Peter French sr. died intestate, leaving defendants as his heirs at law. It is then stated that on or about August 1, 1883, he demanded of the defendants a conveyance of the lot in accordance with the agreement mentioned, but that they had failed and refused to

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convey the same by quitclaim deed or otherwise, and that Peter French sr. did not in his lifetime convey said premises to the plaintiff except as hereinbefore stated, and the plaintiff therefore prayed that the defendants be ordered to convey their interest and title in the lot to the plaintiff, and that the plaintiff's title and possession be quieted in him.

The defendants denied the selling of the lot by Peter French sr., and denied that James W. French was at any time the authorized agent of Peter French sr. and Daphney French, to act for or represent them in the sale of the premises, or in the making of the agreement alleged by the plaintiff, and they claim the property as the heirs-at-law of Peter French sr. At the trial a jury was impaneled to whom the principal questions of fact arising under the pleadings were submitted, and upon which findings were made. One of the most important controverted questions submitted was, whether James W. French was the authorized agent of Peter French sr. and Daphney French, his wife, in the sale of the lot in question. This question was affirmatively answered, and the other questions having been found in favor of the plaintiff Wade, judgment was rendered in accordance with his prayer.

The errors alleged here relate chiefly to the admission of evidence. The plaintiff was called as a witness on his own behalf, and was asked if James W. French represented himself to be the agent of his father; and was also requested to state what was said by James W. French as to the fact of his agency. Although a specific objection was made that agency could not thus be proved, the witness was permitted to testify what the supposed agent said with respect to his authority, and that he represented himself to be acting as the agent of his father in the premises. This testimony was clearly incompetent. It is well settled that while an agent

¹ Agent; evidence of authority.

may testify under oath as to his authority to act for the principal, the mere declarations of one who professes to be an agent are not competent evidence to establish his agency. (*Streeter v. Poor*, 4 Kas. 412; *Howe Machine Co. v. Clark*, 15 id. 492; *Mo. Pac. Rly. Co. v.*

French v. Wade.

Stulla, 31 id. 752.) The objectionable testimony related to a very material if not the pivotal question in the case. The plaintiff did not claim to have communicated or negotiated directly with Peter French sr. regarding the sale of the lot. All negotiations respecting the same were with James W. French, who claimed that he was authorized to sell it to the plaintiff. This authority was denied by the defendants, who claimed that the only authority that was ever given to him by Peter French sr. was to execute a mortgage on the lot to Wade to secure a debt owing to him for the construction of a house thereon; and as the record discloses that subsequent to the alleged agreement, and on January 14, 1875, Peter French sr. and Daphney French actually executed an instrument appointing James W. French as their attorney to execute a mortgage to Wade upon the house and lot in controversy, the importance and effect of the testimony objected to is apparent. This assignment of error must be sustained.

The plaintiff, over the objection of the defendants, read in evidence the deposition of Daphney French, which had been taken at his instance some time prior to the trial. A large part of the testimony which she gave related to communications had with her husband concerning the sale of the lot at

Parsons. It therefore falls within that prohibition of the code which forbids husband or wife
2. Communica-
tions between
husband and
wife.
“to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterward.” And its admission was error. (Code, § 323.)

After the jury had returned its findings, the plaintiff asked and obtained leave to amend his petition by striking therefrom the copy of the written contract as set forth, together with all reference thereto, so as to make the petition conform to the evidence and findings of the jury; and the defendants complain that they were not permitted to plead to or try the case on the petition as amended. It is not clear that the defendants were prejudiced by this ruling; but however that may be, the cause for complaint can now be removed, as the case will have

to be remanded for a new trial, and an opportunity will thus be afforded them to amend their answer and meet the issues as now tendered by the plaintiff.

There are no other questions raised that we need to notice, but for the errors mentioned the judgment must be reversed, and a new trial granted.

All the Justices concurring.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY
v. M. V. B. BENNETT.

ATTORNEY'S LIEN—Notice. Where an attorney, who is a member of a law firm composed of three persons, receives from a railway company a draft to deliver to a third person in the settlement of a law suit, and in such suit none of the members of the firm represented the railway company, or had anything to do with the case, a notice of an attorney's lien served upon the members of the firm, other than the one who actually received the draft, will not be notice upon the attorney receiving the draft, or make such attorney receiving the draft chargeable with negligence in delivering the draft according to his instructions, before the attorney serving notice of his lien has been paid or satisfied.

Error from Cherokee District Court.

IN October, 1884, *M. V. B. Bennett* commenced his action before a justice of the peace of Cherokee county against *The St. Louis & San Francisco Railway Company*, to recover attorney's fees. He obtained judgment before the justice of the peace, and the railway company appealed to the district court. With the consent of the defendant, the plaintiff filed an amended bill of particulars, in words and figures as follows, (court and title omitted :)

"The plaintiff, complaining of the defendant, for his cause of action respectfully shows unto the court, by way of amendment to his original bill of particulars, that the defendant is

St. L. & S. F. Ry. Co. v. Bennett.

a corporation doing business in Cherokee county, state of Kansas; that on the 18th day of September, 1882, and at divers days thereafter, the plaintiff performed services for it as local attorney in the county of Cherokee, state of Kansas; that said defendant agreed and promised to pay to plaintiff such compensation as his services were reasonably worth; that said services were of the value of three hundred dollars; that defendant has often been requested to pay said plaintiff for the same, but that said defendant fails, neglects and refuses to pay plaintiff for the same, or any part thereof; that said sum is due and unpaid.

"Wherefore, plaintiff prays judgment of said defendant for said sum of three hundred dollars and his costs."

The defendant filed no answer, or other pleading in the case.

Trial had at the January Term, 1885, before the court, with a jury. The jury returned a verdict for the plaintiff, and assessed his damages at \$50. They also made the following special findings of fact:

"1. Did the plaintiff represent the railway company in the case of Brubaker against the railway company? No.

"2. Did the firm of Bennett, Lewis & Bennett represent the railway company in the case of Jarrett v. The Railway Company; Cummings v. Railway Company; and Darrick v. The Railway Company? Yes.

"3. Did J. D. Lewis act as one of the attorneys for the railway company in the above case, with the consent of M. V. B. Bennett? Yes.

"4. Was Pat Bennett a member of the firm of Bennett, Lewis & Bennett? Yes.

"5. Did the firm of Bennett, Lewis & Bennett represent the company, or have anything to do with the case of Brubaker v. The Railway Company? No.

"6. Was the draft to pay Mrs. Brubaker sent by the railway company to M. V. B. Bennett to be turned over to Mrs. Brubaker? Yes.

"7. Did Cowley & Hampton, or either of them, notify a member of the firm of Bennett, Lewis & Bennett that they had a claim on the money of Mrs. Brubaker before the check had been delivered to Mrs. Brubaker? Yes."

Thereupon the railway company filed its motion for judg-

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ment upon the special findings, notwithstanding the general verdict, which motion the court overruled. The company then filed a motion for a new trial, which motion was also overruled. The plaintiff remitted ten dollars from the amount of the verdict, and the court then entered judgment against the company for \$40 and costs, taxed at \$24.50. The defendant brings the case here.

W. H. Phelps, for plaintiff in error.

Bennett, Lewis & Bennett, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This action was instituted by M. V. B. Bennett against the St. Louis & San Francisco Railway Company, to recover from it the sum of \$300 for alleged services as attorney. The action was originally brought before a justice of the peace of Cherokee county, and was subsequently taken upon appeal to the district court of that county. The defense was that M. V. B. Bennett represented the railway company in the case of Mrs. Brubaker against the company, and that by reason of his negligence and carelessness in matters connected with that case, the company was required to pay \$111.80, for which it alleged that Bennett was liable. Upon the uncontradicted evidence in the case, not regarding the set-off or counter-claim of the railway company, Bennett was entitled to recover for his services the sum of \$65. If the set-off or counter-claim of the company had been allowed, the company would have been entitled to judgment for \$36.80. The jury rendered a verdict for Bennett for \$50, but he remitted \$10 of this, and judgment was taken for \$40 and costs.

As to the set-off or counter-claim of the railway company, the evidence tended to show that a settlement had been negotiated in the Brubaker case for \$250, and a draft for that amount sent by the company to M. V. B. Bennett to deliver to Mrs. Brubaker. Bennett indorsed and delivered the draft to his brother, Pat. Bennett, a member of the firm of Bennett, Lewis & Bennett, who delivered the same to Mrs. Bru-

St. L. & S. F. Rly. Co. v. Bennett.

baker. The firm of Cowley & Hampton were the attorneys of Mrs. Brubaker, and when they learned that a settlement of the case had been had and that a draft had been received by Bennett to pay Mrs. Brubaker, they attempted to serve upon Bennett a notice of their lien for fees. They claimed \$125. Subsequently they brought suit against the company to recover the amount of their lien, but the case was settled for \$75 and costs, making \$86.80. In addition to this, the railway company paid out \$25 for expenses in making the settlement, making a total of \$111.80, for which it claimed that Bennett was liable. Upon the trial, the railway company asked the court to instruct the jury that—

“If they found from the evidence that Cowley & Hampton, or either of them, served a notice [of their lien for fees in the Brubaker case] upon any member of the firm of Bennett, Lewis & Bennett before the money was paid to Mrs. Brubaker, and a member of the firm upon whom the notice was served had the draft or check in his possession at the time of the service of the notice upon him, the plaintiff could not recover.”

The court refused to give this instruction, but charged the jury, among other things, in effect as follows:

“If you find from the evidence in this case that the plaintiff in this action was employed by the railroad company to look after the case of Mrs. Brubaker v. The Company, and that the same was subsequently compromised, and that he had a draft for Mrs. Brubaker for the purpose of carrying out the terms of the settlement, and that Messrs. Cowley & Hampton, who represented the plaintiff in the action so compromised, notified the plaintiff in this action of their lien upon the money or draft in his hands, it was his duty to protect, or use ordinary care and prudence to protect, the company from any loss; and if in the absence of such care and prudence he permitted the money to be turned over or paid to Mrs. Brubaker, and thereby the company has sustained loss in any sum, then such company will be entitled to recover of the plaintiff in this action a sum as will compensate it, or make it whole therefor. If the plaintiff in this case paid over the draft or check sent him to settle the case of Mrs. Brubaker before he had actual notice of the claim or lien of her attorneys, Messrs.

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Cowley & Hampton, he is not chargeable with negligence in making such payment; but if he had notice of the claim of Messrs. Cowley & Hampton before he paid said draft to Mrs. Brubaker, then it was his duty to use reasonable care, prudence and skill in protecting his client from loss, damage or injury on account thereof."

There was some evidence upon the trial that the firm of Bennett, Lewis & Bennett, of which firm M. V. B. Bennett was a partner, represented the railway company in the case of Mrs. Brubaker against that company; but the jury specially found, as a fact, that the firm of Bennett, Lewis & Bennett did not represent the company, nor have anything to do with the case of Mrs. Brubaker against the railway company. Therefore, if there was any error in the refusal to give the instruction prayed for, this finding is conclusive that such error was in no respect prejudicial to the interests of the company complaining. (*Luke v. Johnnycake*, 9 Kas. 511; *Woodman v. Davis*, 32 id. 344.) If M. V. B. Bennett only acted for the railway company in the case with Mrs. Brubaker in receiving and turning over to her the draft given in settlement of her claim, and the firm of which he is a partner had nothing to do with the case, (and so the jury find,) then a notice of the lien from Messrs. Cowley & Hampton to the other mem-
Notice of at-
torney's lien.
bers of the firm of Bennett, Lewis & Bennett
would not affect M. V. B. Bennett, or make it
negligent for him to deliver to Mrs. Brubaker her draft. M. V. B. Bennett cannot be charged with negligence in delivering the draft, through his brother, to Mrs. Brubaker, unless he had actual notice of the lien of Messrs. Cowley & Hampton before the draft reached Mrs. Brubaker. Counsel comment upon the letter dated September 20, 1882, purporting to be from M. V. B. Bennett to John O'Day, Esq., general attorney of the St. Louis & San Francisco Railway Company, as showing that the firm of Bennett, Lewis & Bennett represented the railway company in the case of Mrs. Brubaker against that company. Mr. Bennett explains this letter by stating that although it purported to be signed by himself, it was written

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by Mr. Lewis, of the firm of Bennett, Lewis & Bennett, and that in some matters it was incorrect. The railway company has no right to complain that the judgment was rendered for \$40 only, when upon the evidence and findings of the jury, Bennett should have had judgment for \$65. If the jury had found that the firm of Bennett, Lewis & Bennett had anything to do with the case of Mrs. Brubaker against the railway company, then, upon the other findings, the company would be entitled to judgment; but the finding upon this point is against the railway company, and although perhaps the preponderance of the evidence is with the company, there seems to be in the record sufficient evidence to sustain the finding.

The judgment of the district court must therefore be affirmed.

All the Justices concurring.

MARTHA KRUEGER V. JAMES H. BECKHAM, *et al.*

1. **ERRORS OF FACT, *Seldom Considered.*** Questions with regard to the assignments of errors *of fact*, alleged to have been committed by a justice of the peace, discussed, and *held*, that such assignments of error can seldom if ever be considered.
2. **CONFESSION OF JUDGMENT; *Waiver of Irregularity.*** Where a justice of the peace left his office and went to the defendant's residence, which was in the same township, and there the defendant waived summons, confessed judgment, and swore to the necessary affidavit therefor, and the justice then returned to his office, where he made the proper entries of the proceedings, *held*, that such judgment is neither void nor voidable; that the defendant, when she waived the summons, confessed the judgment, etc., waived the irregularity of the justice's taking the confession of the judgment at a place other than his office.

Error from Ellis District Court.

THE opinion states the case. Trial at the November Term, 1884, and judgment for the defendants *Beckham, Mercer & Co.* The plaintiff *Krueger* brings the case here.

J. G. Mohler, for plaintiff in error.

Nellis & Reeder, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: The record in this case shows that on February 1, 1884, a judgment for \$300 was rendered by a justice of the peace of Ellis county in favor of James H. Beckham, Joseph W. Mercer and J. G. McKnight, partners as Beckham, Mercer & Co., and against Henry Krueger and Martha Krueger, upon a waiver of summons, a confession of judgment, and an affidavit of the defendants. On February 7, 1884, Martha Krueger took the case to the district court of Ellis county on petition in error, making Beckham, Mercer & Co. parties defendant, but not making Henry Krueger, who was her husband, a party. In her petition in error in the district court she alleged that there were errors of fact as follows:

"1. There is error in fact in said record in stating that the said Martha Krueger appeared in person in said action before said justice of the peace and confessed judgment in said action.

"2. There is error in fact in said record in stating that the said Martha Krueger waived service of summons and time in said action.

"3. There is error in fact in said judgment, said judgment as a matter of fact being against said Martha Krueger and one Henry Krueger, when as a matter of fact said Martha Krueger was never, and is not now, indebted to said Beckham, Mercer & Co. in any sum whatever, nor did the said Martha Krueger in any way or manner become liable for the debt of said Henry Krueger to the said Beckham, Mercer & Co. in any manner whatsoever.

"4. For other errors in fact in said proceedings to the detri-

Krueger v. Beckham.

ment of said Martha Krueger, though not specifically alleged and set forth herein."

No errors of law were alleged or assigned. Upon the question as to whether any errors of fact had occurred, a trial was had before the district court without a jury, and oral evidence was introduced, and upon such evidence the court found generally in favor of the defendants, Beckham, Mercer & Co., and against the plaintiff, Martha Krueger, and rendered judgment accordingly, affirming the judgment of the justice of the peace; and of this judgment of the district court the plaintiff, Martha Krueger, now complains.

No objection was made or exception taken to any proceeding had or ruling made by or before the justice of the peace, nor was any objection made or exception taken by Mrs. Krueger to any proceeding had or ruling made in the district court, except that she excepted to the final rendering of the judgment by the district court. Nor was any motion made by Mrs. Krueger in the district court to reverse, vacate, modify or set aside the judgment, or any finding, order, ruling or proceeding of that court; nor was any motion made in either court for a new trial.

We do not think that the judgment of either court can be disturbed by this court. It is seldom if ever that a judgment or order of any court can be disturbed on petition in error, except for errors appearing upon the face of the record. It is seldom if ever that a judgment or order of any court can be disturbed on petition in error for mere errors of fact, and it never can be so disturbed for matters *dehors* the record which contradict the recitals of the record, and never for facts which merely go to make up or constitute or to prove or disprove or merely concern the plaintiff's cause of action or the defense thereto. Nor will a judgment rendered by a court of competent jurisdiction, having jurisdiction of both the parties and the subject-matter of the action, be disturbed on petition in error for irregularities occurring prior to the rendition of the judgment, where no objection was made or exception taken, although such ir-

1. Errors of fact, seldom considered.

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regularities may be ever so great. And where a trial has been had upon issues presented by the parties to the court and evidence introduced to prove the same, the judgment will not be disturbed for any errors of law occurring at the trial, or for the reason that the decision is not sustained by sufficient evidence, unless a motion for a new trial has been duly made and overruled; and even where a motion for a new trial has been made and overruled, still the judgment will not be disturbed on the ground that the decision is against the evidence, where the preponderance of the evidence, as in this case, sustains the decision.

Under some of the authorities in other states, some judgments or orders of some courts may be disturbed for errors of fact, whether the facts appear upon the face of the record or not: provided that the facts to be proved must not contradict the record; and provided further, that they show only such irregularities as tend to thwart or contravene the due administration of justice, aside from matters concerning the plaintiff's cause of action or the defense thereto, and not such facts merely as have reference only to the plaintiff's cause of action or the defense thereto.

In this case the assignments of error cannot avail the plaintiff anything. The first three assignments of error tend to contradict the record; the third has reference merely to the cause of action set forth by the present defendants in error, plaintiffs in the justice's court, and Mrs. Krueger's defense thereto; and the fourth assignment of error is too general and indefinite to be considered as of any value. There is one question, however, upon which evidence was introduced in the court below, and which question the court below may have considered in deciding the case, and that question is, whether the justice of the peace had jurisdiction to render the judgment against Mrs. Krueger in the manner in which he did render it. It appears from the evidence that both the justice of the peace and Mrs. Krueger reside in Hays City, Big Creek township, Ellis county, Kansas, and that the justice held his office in such town and township. What the distance is be-

Krueger v. Beckham.

tween the justice's office and Mrs. Krueger's residence, is not shown. The justice left his office and went to her residence, where she waived summons, confessed the judgment complained of in this proceeding, and was sworn to the necessary affidavit therefor, and the justice then returned to his office, where he made the proper entries on his docket. Now under the evidence the fact that the confession of judgment was taken at Mrs. Krueger's residence, and not at the justice's office, was the only irregularity that occurred in all the proceedings; and this irregularity was shown only by the parol evidence and not by the record of the justice of the peace, and we do not think that it renders the judgment of the justice of the peace either void or voidable; for when Mrs. Krueger voluntarily confessed judgment and permitted all the other steps to be taken necessary for the rendition of the judgment, she waived the irregularity in taking the confession of judgment.

2. Confession of judgment; waiver of irregularity.

The case of *Phillips v. Thralls*, 26 Kas. 780, has no application to this case. In that case the justice went out of his township to hold his court, while in this case the justice remained in his township during the occurrence of all the proceedings. This is the principal question discussed by counsel for plaintiff in error, and upon this question we must decide against his client. We think the judgment of the justice of the peace is valid, and that it cannot properly be set aside.

The judgment of the court below will be affirmed.

All the Justices concurring.

WILLIAM R. HAZEN V. HARVEY M. ROUNSAVILLE.

OCCUPYING-CLAIMANT LAW; Review. The defeated occupant in an action for the recovery of real property is entitled to an investigation of his right under the occupying-claimant law upon a mere request, and error will not lie to the supreme court from a ruling of the district court, causing a journal entry of the request of the claimant to be made, and allowing an investigation of his claim to proceed.

Error from Shawnee District Court.

THE material facts are stated in the opinion. The plaintiff *Hazen* brings the case here.

J. P. Greer, and *Hazen & Isenhardt*, for plaintiff in error.

The opinion of the court was delivered by

JOHNSTON, J.: In an action of ejectment brought by William R. Hazen against Harvey M. Rounsaville, it was found and adjudged that Hazen was the owner and entitled to the possession of lots Nos. 385 and 387 Taylor street, in the city of Topeka. The judgment was brought to this court for review, and in January, 1885, a decision was rendered affirming the same. (*Rounsaville v. Hazen*, 33 Kas. 71.) When the mandate of the supreme court was presented and an entry thereof made in the district court, an application was made by Harvey M. Rounsaville for the benefit of the occupying-claimant law. The court thereupon ordered that a hearing of said application be had on a future day, at which time considerable testimony was taken upon the application regarding the improvements placed upon the lots by the defendant, and his rights as an occupying claimant. The court sustained the request and application of the defendant, and held that he was entitled to the relief asked for, and allowed further proceedings to be taken in the premises in accordance with the provision of the statute. W. R. Hazen excepted to this ruling, and now prosecutes a petition in error to reverse it.

No appearance has been made here for the defendant, which

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may perhaps be accounted for by the fact that he does not deem the ruling one of which we may take cognizance at this time. It is clear that such is the case, and that the ruling made is not before us for review. It is not a judgment or final order, nor does it fall within any of the orders specifically enumerated in § 542 of the code as subject to review in this court. In fact, no adjudication was necessary, nor should any have been made upon the application. The statute declaring the steps that are to be taken at this stage of the proceedings is as follows:

“The court rendering judgment in any case provided for by this act against the occupying claimant, shall, at the request of either party, cause a journal entry thereof to be made, and the sheriff and clerk of the court, when thereafter required by either party, shall meet and draw from the box a jury of twelve men of the jurymen returned to serve as such for the proper county, in the same manner as the sheriff and county clerk are required by law to draw a jury in other cases, and immediately thereupon the clerk shall issue an order to the sheriff under the seal of the court, setting forth the name of the jury and the duty to be performed under this article.” (Civil Code, § 603.)

This provision plainly indicates the procedure to be pursued when judgment is rendered against the party in possession. Upon the mere request of the occupant, a journal entry of the request is allowed and made. The defeated occupant is entitled to have inquiry instituted under the provisions of the occupying-claimant act, upon proper application, and the court is without discretion in allowing it. It is given as a matter of course, just the same as a second trial of the action for the recovery of real property is allowed upon a proper demand. When the application is made and allowed, either party may continue the investigation by the calling of a jury. The assessments and valuations made by the jury are reported to the court, and at the succeeding term action is taken thereon and such judgment is rendered as the findings of the jury, as well as the nature of the case, will warrant. The judgment then rendered may properly be brought before this court

for review, and the questions sought to be raised in this proceeding may then be raised and determined. The record, however, shows that the request of the defendant for an investigation of his rights as an occupying claimant was allowed and entered, and this ruling is not reviewable here.

The petition in error will therefore be dismissed.

All the Justices concurring.

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47 597

R. N. HERSHFIELD v. L. M. LOWENTHAL, *et al.*

ATTACHMENT; Note in Settlement of Account. Where a note is accepted in the settlement of an open account and is taken as absolute payment and extinguishment of the former debt, the fraudulent disposition of a part of his property by the debtor several months prior to the execution of the note, but during the existence of the open account, is not a ground for attachment in an action brought to recover upon the promissory note.

Error from Sedgwick District Court.

On February 16, 1885, *R. N. Hershfield* commenced his action against *L. M. Lowenthal* and *A. F. Lowenthal*, partners as Lowenthal Bros., to recover \$400, with interest, upon two promissory notes, each for \$200, executed by the defendants on November 29, 1884. The notes were not due at the commencement of the action. Upon the same day the plaintiff filed an affidavit to obtain an attachment against the defendants, and as grounds of attachment alleged that the said defendants "had sold, conveyed, and otherwise disposed of their property with the fraudulent intent to cheat and defraud their creditors, and to hinder and delay their creditors in the collection of their debts; and that they were about to make sale and disposition of their property with the intent fraudulently to hinder and delay their creditors in the collection of their debts." The order of attachment was granted by the district

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judge, and certain jewelry attached, of the value of \$598. On March 10, 1885, the defendants made a motion to discharge the attachment, and filed an affidavit denying the grounds therefor. The motion to discharge the attachment was heard by the district judge at chambers, at Wichita, in Sedgwick county, on March 30, 1885. Upon the testimony presented, the judge vacated the order of attachment and discharged the property attached. The plaintiff excepted, and brings the case here.

John R. Parsons, for plaintiff in error.

W. E. Stanley, for defendants in error. .

The opinion of the court was delivered by

HORTON, C. J.: The question in this case is one of fact. L. M. Lowenthal, one of the defendants, testified in person before the district judge, and the plaintiff to sustain his ground of attachment introduced affidavits of admissions of the said Lowenthal. It is sufficient to say that we think there is sufficient evidence to sustain the finding of the district judge—at least it does not appear that his finding was clearly erroneous. It is not necessary for us, in affirming the decision of the district judge, to say that the decision was absolutely right, or that we would have decided so if we had heard the case. (*Urquhart v. Smith*, 5 Kas. 447; *Tyler v. Safford*, 24 id. 580; *Harris v. Capell*, 28 id. 117; *Brown v. Mabbett*, 28 id. 723; *Wilson v. Lightbody*, 29 id. 446.)

Counsel comments upon the fact that one of the partners, A. F. Lowenthal, made way with fourteen or fifteen hundred dollars' worth of diamonds. This, however, was prior to the execution of the notes sued on. A. F. Lowenthal went away with the diamonds belonging to the partnership in September, 1884. The notes in suit were not executed until November 29, 1884. Subsequently, and before suit, the partnership was dissolved. Counsel refers to the fact that the notes were executed for goods and merchandise sent by the plaintiff to defendants in June, 1884, and asserts that the notes were given

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only as collateral evidence of the preëxisting debt. There is evidence in the record tending to show that the notes were given as the absolute payment and extinguishment of said debt. The account for goods and merchandise is not sued upon, but the action is upon the notes only. The evidence also shows that an account was taken in November, 1884, between the plaintiff and the defendants, and that the note sued upon, with other notes, were taken at the time by the plaintiff from the defendants in settlement of the open account between the parties. Upon this matter the district judge decided in favor of the defendants, and we cannot disturb that decision. (*Shepard v. Allen*, 16 Kas. 182; *Medberry v. Soper*, 17 id. 369.) The acceptance of the new notes in settlement of the open account was the creation of a new debt, the consideration of the notes being the former account. Therefore the wrongful disposition of the diamonds in September, 1884, cannot be urged as a ground for attachment upon the notes executed November 29, 1884.

The ruling and order of the district judge will be affirmed.

VALENTINE, J., concurring.

JOHNSTON, J., not sitting.

SAMANTHA E. HODSON, *et al.*, v. HESTER F. WELDEN.

AT the April Term, 1885, of the district court of Smith county, plaintiff *Welden* recovered a judgment against defendants *Hodson* and two others, who bring the case to this court.

A. Saxe & Son, for plaintiffs in error.

Webb McNall, and *Uhl & Pickler*, for defendant in error.

Per Curiam: An examination of the voluminous affidavits presented satisfies us that Samantha E. Hodson, one of the

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plaintiffs in error, is in no condition to complain of the judgment of the trial court. Since that judgment was rendered, there has been a settlement of the matters in litigation between her and Hester F. Welden, the defendant in error. She has thereby waived any errors that may have occurred. (*Fenlon v. Goodwin*, ante, p. 123; *Babbitt v. Corby*, 13 Kas. 612.) The other plaintiffs in error, Egbert Welden and Gilbert Welden, never filed any motion for a new trial. They cannot avail themselves of the benefits of the motion filed by Samantha E. Hodson. An examination of the petition, the findings of the jury, and the judgment of the court, show that as to Egbert and Gilbert Welden no errors appear of record.

Inasmuch as an attempt has been made to show that Messrs. Saxey & Son, who appear in this court as attorneys for Egbert Welden and Gilbert Welden, have no authority therefor, it is but justice to them for us to say that their appearance seems to us to be fully justified; but as Egbert and Gilbert Welden neglected to take proper steps to except to the alleged errors occurring on the trial, there is nothing now in the record of which they can complain. The petition sustains the judgment, and the special findings of the jury are not in conflict with the general findings of the court or the judgment rendered.

The motion to dismiss must therefore be sustained.

HORACE WIGGIN, *et al.*, v. ESTHER KING.

EJECTMENT, brought by *King* against *Wiggin* and another. Trial at the May Term, 1884, of the district court of Franklin county, and judgment for plaintiff. The defendants bring the case here.

H. C. Mechem, for plaintiffs in error.

H. P. Welsh, and *W. H. Clark*, for defendant in error.

Per Curiam: This is an action in the nature of ejectment, brought by Esther King against Horace Wiggin and Albert E. Wiggin, for the recovery of an eighty-acre tract of land situated in Franklin county, Kansas. The trial having resulted in favor of the plaintiff, the defendants bring the case here for review. Esther King was an Ottawa Indian, and the land in controversy, being a part of the Ottawa reservation, was allotted to her under the provisions of the treaty concluded on the 24th day of June, 1862, and upon this allotment her right of recovery was based. The plaintiffs in error claim the land under a guardian's deed, which purported to be executed by the guardian of Esther King in October, 1872, before she became of full age. The question presented for determination was whether, under the restrictions of the treaty of 1862 and the treaty of 1867, the lands allotted to Esther King could be alienated while she was yet a minor. The court answered this question in the negative, and excluded the guardian's deed from its consideration. The case, as will be seen, falls within the decision of *Campbell v. Paramore*, 17 Kas. 639. The provisions of the treaties of 1862 and of 1867 relating to restrictions upon the alienation of land were there considered and interpreted, and it was held that the restrictions upon the sale of land allotted to minors were not removed until they arrived at full age. If the contention of the plaintiffs in error, that the Ottawa Indians, under the terms of the treaty of 1862, became citizens before the treaty of 1867 took effect, was upheld, it would result in nullifying the treaty of 1867, because the president and senate are not authorized to enter into a treaty with citizens of the United States. If we are in error in the view which has been taken in the treaties, the plaintiffs in error are not without remedy, as the question is one which may be presented to the supreme court of the United States for its decision; but we are disposed to follow the ruling in the case cited, and therefore the judgment of the district court will be affirmed.

St. L. & S. F. Ry. Co. v. Weaver.

JULY TERM, 1886.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.
 HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
 HON. WILLIAM A. JOHNSTON, }

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY
 V. JOHN W. WEAVER.

1. *CASE—Removal to Federal Court.* A case cannot be removed from a state court to the federal courts under the act of congress of March 3, 1875, after a hearing has been had in the state court on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action.
2. *CONTRIBUTORY NEGLIGENCE; Finding, Sustained.* The jury found as a fact that the plaintiff was not guilty of contributory negligence. *Held,* That the supreme court cannot say from the evidence and as a matter of law that the finding of the jury is erroneous.
3. ——— *Burden of Proof.* The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant.
4. *NEGLIGENCE; Finding, Sustained.* The jury found as a fact, that the defendant was guilty of negligence in two or more particulars, causing the injuries complained of. *Held,* That the supreme court cannot, under the evidence and as a matter of law, say that the finding of the jury is erroneous.
5. *SECTION BOSS AND ENGINEER, Not Coemployés.* A section foreman or section boss in the employment of a railroad company is not a co-employé or fellow-servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of that rule of the common law which exempts the master from liability for negligence between coemployés or fellow-servants.
6. *COMMON LAW, Judicial Notice of.* The courts of this state may take judicial notice of the common law of Kansas, and what it would be except for our own statutes and our own written law; and for this purpose the courts of this state may take judicial notice of all the judicial decisions in this country and in all other countries which

have adopted the common law of England; but for the purpose that the courts of this state shall know as a fact in a particular case what the common law of some other state is, such law must be proved as any other fact.

7. **COMMON LAW, *When to Govern; Presumption.*** Where a cause of action involves as a question of fact what the common law of some other state is, it will be held that the common law of such other state is the same as that of Kansas, unless it is shown by the evidence to be otherwise; and when it is shown by the evidence to be otherwise, it will govern as it is thus shown to be.
8. **MASTER — *When Liable, When Not.*** The question as to when a master at common law is liable and when not liable for negligence between coemployés, discussed.
9. **EVIDENCE — *Conversation between Civil Engineer and Roadmaster.*** Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division roadmaster, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer made in such conversation may be given in evidence as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division.
10. **IMPEACHMENT OF *Party's Own Witness.*** The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and although the court may have committed slight error in the present case in permitting such an impeachment, yet under the circumstances of the case the supreme court cannot say that any material error was committed.
11. **REPAIRS AFTER ACCIDENT, *as Evidence.*** The injuries complained of were caused by the alleged incapacity of a passage-way for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such water-way. *Held,* That this evidence did not of itself prove negligence, nor that the defendant had notice of the insufficiency of the water-way prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but at most, it only tended to prove, by way of admission on the part of the defendant, that the water-way was originally too small; and the introduction of such evidence for this purpose was not erroneous.
12. **RAILROAD COMPANY, *to Keep Track and Roadway Safe.*** The law does not require that a railroad company shall, as between it and its employés, guarantee the sufficiency, good order and good condition of

St. L. & S. F. Rly. Co. v. Weaver.

its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition; and held, that the present case was tried upon such theory of the law.

18. ——— *Company to Make Road Safe.* A railroad company, as between it and its employes, must exercise reasonable and ordinary care and diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same.

Error from Harvey District Court.

ACTION brought by *John W. Weaver* against *The St. Louis & San Francisco Railway Company*, to recover damages for personal injuries. Trial at the January Term, 1885, when the jury found for the plaintiff, and assessed his damages at \$10,000. In answer to special questions submitted to them, at the request of defendant, the jury made special findings of fact, as follows:

"1. What caused the plaintiff's injuries complained of in his petition? A. Wreck.

"2. If you find that he was injured by a wreck on the defendant's road, state the cause of the wreck. A. Wash-out.

"3. If caused by a storm, state the nature thereof; whether it was of an unusual, violent and unprecedented character? A. An unusual rain, but not unprecedented.

"4. State whether or not a water-spout or tornado occurred that night in the valley above where the wreck occurred? A. No.

"5. Was the plaintiff injured as the result of his own negligence, or of the defendant's negligence; or was it the result of both his negligence and that of the defendant? A. Defendant's.

"6. If you find that it was the result of the defendant's negligence, state in what the negligence consisted. A. Improper construction of water-ways, and negligence on part of section foreman.

"7. If you find that an unusual storm occurred in the valley above the wreck that night, did plaintiff know or have reason to believe, before he reached the place where the wreck occurred, that such storm had prevailed? A. No.

"8. By what corporation or company was this railroad constructed? A. St. Louis, Arkansas & Texas.

"9. Did the company which constructed the road at the

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place where plaintiff was injured, use due care and diligence in the construction of the same? A. No.

"10. Who was the chief engineer and person who had charge of the construction of the road at the place where the accident occurred? A. Dun.

"11. Was the chief engineer who had charge of the construction of said road a skillful, competent and prudent man for the work in which he engaged? A. Yes, but liable to mistakes.

"12. If you find that the road was not properly constructed, state in what particular. A. Insufficient water-ways.

"13. Were the water-ways and water-gaps which were placed in the road at the time of its construction of sufficient capacity to carry off the water that fell in an ordinary and usual storm in that country? A. Yes.

"14. Was the road properly constructed at the place where the wreck occurred? A. No.

"15. If you find that it was not properly constructed, state in what particular it was defectively constructed? A. Insufficient water-ways.

"16. State whether or not the water-ways and water-gaps were of sufficient capacity to carry off all the water which the company had reasonable ground to believe would fall in that valley during any storm likely to occur? A. No.

"17. Did the men engaged in the construction of the road at the place of the accident exercise the highest practical diligence which capable and faithful railroad men would exercise under similar circumstances? A. No.

"18. If you find they did not, in what did their failure consist? A. In not providing a sufficient water-way.

"19. From the time of Downing's employment to the time of the accident complained of, had the defendant company, or any of its officers, reason to believe that Downing was incompetent, unskillful, or unfit for the position which he held? A. No.

"20. Did the defendant, at the time it employed J. R. Ward as division roadmaster, and up to the time of the accident, have reason to believe that he, Ward, was a competent, skillful and capable man for the position which he filled? A. Yes.

"21. Was Samuel Lyman, at the time he was employed by the defendant company as general roadmaster, a competent, capable and skillful man for the position of general roadmaster? A. Yes.

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"22. Was the defendant company or any of its agents or employes guilty of negligence in the construction or maintenance of its road at the place of the wreck? A. Yes.

"23. If you find that they were, what officers or servants were they, and in what did the negligence consist? A. Chief engineer; improper construction of the water-ways.

"24. If you find that the road was imperfectly constructed, state whether the attention of the company, or its officers, or employes, was called or directed to the imperfect construction? A. Yes.

"25. At what rate of speed was the plaintiff running his train when it came around the curve in sight of the point where the wreck occurred? A. Twelve to fourteen miles per hour.

"26. Was the plaintiff, at the time of the wreck, running his engine at a greater rate of speed than fourteen miles per hour? A. No.

"27. If you find that the plaintiff's injuries were caused by the negligent act of the defendant, state specifically in what that act consisted? A. Improper construction of water-way, and failure of the section foreman to warn the train-men of danger.

"28. Was Charles Downing and the plaintiff engaged in the same common enterprise at the time of the wreck, subject to the control and direction of the same general master, engaged in the same common employment or pursuit? A. No.

"29. If you find that the water-way at the place of the accident was deficient in dimensions, was the fact thereof equally within the knowledge of the plaintiff and defendant, and did the plaintiff have as good opportunity to discover the same as the defendant? A. No.

"30. In what amount was the plaintiff actually damaged by reason of the injury complained of in his petition? A. \$10,000.

"31. Were the water-ways in the valley at the place of the wreck of sufficient dimensions to carry off all the water which the defendant company, by the exercise of prudence and care, had reason to anticipate at the time of the construction of the road would fall in that valley? A. No.

"32. Would a water-gap fifty feet wide have carried off the water which came down the valley that night without running over the track? A. Don't know.

"33. Were the water-ways and water-gaps clear and unobstructed up to the time of the accident? A. Yes.

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"34. Were the water-ways and gaps of the road at this point of sufficient capacity to carry off the water which came down the valley during the severest storms, from the time of the construction of the road to the time when the wreck occurred? A. No.

"35. Was G. W. Turner, the master carpenter who superintended the construction and maintenance of the water-ways at the place of the wreck, a competent, skillful and careful man in his business, and did he in such construction and maintenance use due care and skill? A. Yes.

"36. If you find he was not or did not, state in what particular he was negligent. (Not answered.)

"37. Was ———, the bridge inspector, whose duty it was to examine the water-ways at or near the place where the accident occurred, a careful and skillful man; and did he, in the exercise of his duty, use a degree of care commensurate thereto? A. No.

"38. If you find he did not, state what he failed to do that he should have done. A. Ordered the culvert enlarged.

"39. Did the defendant company use due and adequate care to safely maintain its road-bed, water-ways and bridges at the place where the accident occurred? A. No.

"40. If you find it did not, state wherein it failed, and what particular officer, agent or employé it was who caused such failure. A. Building improper bridges; chief engineer.

"41. Did the defendant company, at the time it employed Charles Downing, have reason to believe him a sober, industrious, skillful and competent man for the purposes of his employment? A. Yes.

"42. At what rate of speed did the plaintiff cross the bridge over Clear creek, about half a mile below where the wreck occurred? A. Between 10 to 14 miles.

"43. Did the plaintiff increase the rate of speed after passing Clear creek, before coming to the place of the wreck? A. Don't think he did.

"44. Some indications of hard weather had preceded plaintiff before reaching the place of the wreck; did plaintiff observe anything at Clear creek to indicate that there was high water along the road? A. Not dangerously high.

"45. What precautions, if any, did plaintiff take in running his train that night, after seeing the high water in Clear creek? A. Ordinary precaution.

"46. To what rate of speed, under the rules of the com-

pany, was plaintiff restricted in running over the bridge across Clear creek? A. Ten miles per hour.

"47. Under the rules of the company, was it the duty of the section foreman to pass over, or send men over the track ahead of freight trains, after a storm? A. Yes.

"48. What officer or employé of the railroad company had charge of keeping the track in repair where the injury occurred? A. Section foreman.

"49. Would a person, in the exercise of ordinary care and caution, such as would be exercised by a prudent man, have come up the valley in which the plaintiff was injured, under the conditions and circumstances that the plaintiff in this case did, after seeing the high water in Clear creek, without first either sending some one ahead or having reduced the rate of speed of the train, so as to have brought it entirely within his control? A. Yes.

"50. Was the water-gap at the place where the plaintiff was injured obstructed by flood-trash, grass, weeds, or otherwise, so as to prevent the free passage of water through the same prior to the storm on the night of the accident? A. No.

"51. Was not the water in Clear creek, when plaintiff crossed it, higher than he had ever seen it prior to that time? A. Yes."

Special findings of fact in answer to special questions presented to the jury at the request of the plaintiff:

"1. Had plaintiff crossed the bridge over Clear creek about one-half mile before he came to the place where the train was wrecked? A. Yes.

"2. Did the plaintiff find the roadway and bridge at and near Clear creek in safe condition at the time he crossed the same? A. Yes.

"3. Did plaintiff know that the place where the wreck occurred was on a higher level than Clear creek? A. Yes.

"4. Was there anything in the condition of Clear creek, or in the indications of the storm between Clear creek and the place of the wreck which would cause the plaintiff to believe that the track or culverts and water-ways in the upper valley were in any manner unsafe? A. No.

"5. What was the plaintiff's age at the time of his injury? A. Thirty-six years.

"6. Had he at that time any other calling or occupation than that of locomotive engineer? A. No.

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"7. Had plaintiff been a locomotive engineer for about 14 years before his injury? A. Yes.

"8. Had plaintiff as such engineer earned and received from \$3.50 to \$4 per day for his services as such? A. Yes.

"9. Were the services of the plaintiff worth from \$3.50 to \$4 per day at the time of the injury? A. Yes.

"10. In time of high water in the valley where the wreck occurred, did the main channel of the creek overflow its banks? A. Yes.

"11. In case of overflow of the banks of the main channel of such creek, would a large part flow to the culvert, the washing out of which caused the injury to plaintiff? A. Yes.

"12. Could defendant have learned by exercise of reasonable diligence that the culvert at such place was insufficient in size to permit the free passage of water in time of high water or overflow? A. Yes.

"13. Could the section foreman, Downing, have gone from his section-house to the place of the wreck in twenty minutes and have discovered the wash-out? A. Yes.

"14. Was it the duty of such section foreman in time of heavy rain to inspect the road and report to train-men and officers of the road any defects therein? A. Yes.

"15. Did the section foreman on that section negligently fail to go over said road during and after a severe storm which prevailed there at that time and give men on train notice thereof? A. Yes.

"16. Was the road in question completed in August, 1881? A. Yes."

The court rendered judgment for the plaintiff and against the defendant for the amount of the verdict, with costs. To reverse this judgment *The Railway Company* brings the case to this court. The opinion contains a sufficient statement of the facts.

John O'Day, for plaintiff in error.

Jackson & Royse, and *Bowman & Bucher*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Harvey county, by John W. Weaver against the St.

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Louis & San Francisco Railway Company, to recover for personal injuries alleged to have been caused by the negligence of the defendant and its employes. A trial was had before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, and assessed the damages at ten thousand dollars, and also made sixty-seven special findings of fact; and upon this general verdict and these special findings of fact, the court below rendered judgment in favor of the plaintiff and against the defendant and for the amount of the verdict, with costs. To reverse this judgment the defendant brings the case to this court.

The alleged injuries occurred on May 19, 1883, at about 3 o'clock in the morning, at a point on the defendant's railway where the same crosses Vernon valley, about four miles north of Fayetteville, Washington county, Arkansas.

Statement of
facts.

The plaintiff at the time was a locomotive engineer in the employment of the defendant, and had charge of an engine drawing one of defendant's freight trains from Van Buren, Arkansas, northeasterly, to Rogers, in the same state. J. Workman was the fireman on the same train. James Dun was the defendant's chief civil engineer, and had the general charge of the construction and repairs of the defendant's railway. J. F. Hinckley was an assistant civil engineer under Dun. Samuel Lyman was the defendant's general roadmaster, John R. Ward was the division roadmaster for that division, and Charles Downing was the section foreman for that section, which includes the place where the accident and the alleged injuries occurred. The injuries were caused by the engine's running into a "wash-out" at the southeast side of Vernon valley, about 900 feet south of where the railway crosses the main channel of Vernon creek or Vernon branch. At the main channel of Vernon branch, a pile trestle, sixty feet wide and six feet high, was constructed for the water to pass through. At the place where the accident occurred, a wooden box culvert, six feet wide and four or five feet high, was constructed for the purpose of draining some low ground, and possibly also of carrying off a portion of the water that might

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flow down Vernon valley during times of high water. The water at this place flowed from the east to the west, though the general course of the stream was from northeasterly to southwesterly, and except during times of wet weather no water passed through this culvert, but all passed through the pile trestle. At the time of the accident, a large volume of water was flowing down Vernon valley, and the high water of that night had washed out the culvert. The plaintiff's engine ran into the place where the culvert had been washed out, turned to the left, and turned over on its side; and while it was turning the plaintiff jumped from the cab window, on the upper side, and into a swift current of water. This current carried him back to the engine, which was still in motion, and his left arm was caught between the driving-rods of the engine, and was so crushed as to require amputation above his elbow and near the shoulder; and this injury and the incidental and consequent injuries, are the injuries of which the plaintiff now complains.

The first question involved in this case is, whether the court below had jurisdiction to try the case, or not. The plaintiff in error, defendant below, claims that the case was removed from the state district court to the United States circuit court. It appears that the defendant was at the time of the accident, and still is, a corporation organized under the laws of the state of Missouri, but besides doing business in the state of Missouri, it then did and still does business in both the states of Arkansas and Kansas. The plaintiff at the time of the accident was a resident of Arkansas. Afterward, and before commencing this action, he removed to and became a resident of the state of Missouri, and while a resident of the last-mentioned state he commenced this action in Kansas. He is still a resident of the state of Missouri. He commenced this action on December 17, 1883. On January 4, 1884, the defendant filed a general demurrer to the plaintiff's petition, upon the alleged ground that the petition did not "state facts sufficient to entitle the plaintiff to maintain his said action against the said defendant." On February 4, 1884, the demurrer

was overruled. Afterward the defendant filed an answer, and also an amended answer, and the plaintiff replied thereto. Afterward, and on May 20, 1884, the defendant filed its petition and bond for a removal of the case to the circuit court of the United States; and afterward, and on October 13, 1884, filed its plea in abatement, claiming that the case had already been removed to the circuit court of the United States. Both the application for the removal and the plea in abatement were overruled.

Now, passing over all other questions with regard to removal, we think the defendant made its application for removal too late. It has been decided by the supreme court of the United States, in at least three cases, that a case cannot be removed from a state court to the federal courts under the act of congress of March 3, 1875, after a hearing has been had in the state court on a demurrer to the complaint because it did not state facts sufficient to constitute a cause of action. (*Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 id. 711; *Gregory v. Hartley*, 113 id. 742.)

The next question is really one of fact: was the plaintiff guilty of contributory negligence? The distance from Van Buren to the place where the accident occurred is 61 miles, and to Rogers, 77 miles. When the plaintiff's train left Van Buren, which was on May 18, 1883, at 7:30 o'clock in the evening, it was raining slightly. When the train reached West Fork, a distance of about 45 miles from Van Buren and 16 miles south of where the accident occurred, evidences were observed which indicated that a great storm had crossed the track. At Fayetteville, four miles south of where the accident occurred, there were still evidences of rain, but no evidence of any great storm. When the train crossed Clear creek, something over half a mile from where the accident occurred, it was noticed that the stream was unusually high; but from Clear creek to the place where the accident occurred the grade is ascending, and there was very little if anything to indicate danger until the train had approached very near to Vernon valley, where the accident occurred, and nothing to conclu-

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sively show danger until the engine commenced to turn to the left and to turn over, as aforesaid. This was all in the night-time, about 3 o'clock in the morning. In Vernon valley, where the railway crosses Vernon branch, or Vernon creek, there is a pile trestle about sixty feet wide and six feet high, for the water of Vernon branch to run through; and this trestle is about 900 feet north from the culvert, or sluiceway, as it was sometimes called, where the accident occurred. The bed of Vernon creek is also a few feet higher than the bottom of this culvert or the ground where it was placed. It was not intended that Vernon branch or any portion of the stream itself should pass through this culvert, but the culvert was really intended to carry off only the water from some low ground adjacent thereto. But in constructing the railway, in putting in the pile trestle where the water of Vernon branch was to run through, and digging a ditch from that point on the east side of the railway to the point where the accident occurred, and throwing up an embankment of solid earth on which to place the railway track, the course of Vernon branch was so changed that during times of high water a large proportion of the water from the branch passed along the east side of the railway to the culvert and ran through the culvert and down a ravine to the main branch. Upon these facts,

2. Contributory negligence; finding, sustained.

we cannot say, as a matter of law, that the plaintiff was guilty of culpable contributory negligence. We have not stated the facts in the great detail in which they were proved, but, taking all of them just as they were proved, we cannot say, as a matter of law, that the plaintiff was guilty of any culpable contributory negligence; and therefore the findings of the jury, general and special, that the plaintiff was not guilty of such negligence, must be sustained.

It is claimed, however, that the burden of proof rests upon the plaintiff to show that he was *not* guilty of contributory negligence, and not upon the defendant to show that he *was*. The rule, however, in this state, is otherwise. (*K. P. Rly. Co. v. Pointer*, 14 Kas. 38, 50; *K. C.*

3. Burden of proof.

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L. & S. Rld. Co. v. Phillibert, 25 id. 583; see also *Beach on Contributory Neg.*, 430, §157.) The law presumes that every person performs his duty; and this presumption continues until it is shown affirmatively that he does not or has not. Hence, wherever there is no evidence upon the subject, or where the evidence is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty and is not guilty of any culpable negligence, contributory or otherwise. Hence, while it may be said in a general sense that the burden of proving his case devolves upon the plaintiff, yet if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case. This is virtually throwing the burden of proof to show that the plaintiff has been guilty of culpable contributory negligence upon the defendant; and this has been the uniform holding of this court.

The next general question is, whether it has been shown that the defendant was guilty of negligence. This question is principally one of fact. The principal negligence charged against the defendant in the present case is the failure of the defendant and its employes to put in a sufficient culvert at the place where the accident occurred, to carry off all the water which naturally flowed to it in times of high water, or which was caused to flow to it by reason of the manner in which the railway was constructed at Vernou valley; and also the failure of the defendant and its servants or agents to exercise reasonable diligence to discover the "wash-out" and to give the plaintiff and the other train-men proper warning of the danger before the accident occurred; and the principal agents of the defendant who are charged with negligence are the defendant's chief civil engineer and his assistants, and the section foreman of the section where the accident occurred, and his assistants. We have already stated how the railway track, trestle, embankments, ditches, culverts, etc., were constructed

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at Vernon valley, so as to cause the principal portion of the water flowing down this valley during times of high water to flow down to this culvert, instead of passing through the pile trestle, through which it was intended that it should pass; and also the dimensions and capacity of the culvert. We would further state that the section foreman resided about three miles south of the place where the accident occurred, and had at the place of his residence assistants, hand-cars, lights, tools, torpedoes, signals, etc., and that he could have gone with a hand-car to the place where the accident occurred in about twenty minutes, and it was his duty to do so, but he

did not. Taking all the facts and circumstances of this case together, we cannot say, as a matter of law, that the jury erred in finding as a matter of fact that the defendant was guilty of negligence in the respect aforesaid.

It is claimed, however, by the plaintiff in error, defendant below, that the section foreman was not a representative of the defendant as between the plaintiff and the defendant, but that the plaintiff and the section foreman were coemployés, mere fellow-servants of the same master, in a common line of employment; and therefore that under the common law, which is admitted to be in force in Arkansas, where the accident occurred, the defendant is not liable to the plaintiff for the negligence of the section foreman. There is nothing in this case, however, to show what the courts or others in Arkansas consider to be the rule of the common law in cases of this kind, and there is a great difference of opinion prevailing in this country upon this subject; hence we must decide this case upon our own views as to what the rule of the common law in

4. Negligence;
finding sus-
tained.

7. Common law,
when to gov-
ern; presump-
tion.

such cases is. It may be that our view of what the common law is, differs from that of the supreme court of Arkansas; but as it has not been proved in this case, as a matter of fact, what view the supreme court of Arkansas or the courts of that state take upon this question, it will be necessary, as before stated, for us to follow our own views as to what the common law upon this subject is.

If it had been proved in the case what view the supreme court of Arkansas has taken with respect to the common law in cases of this kind, we would follow its view; and this we would do even if its views should differ from ours. If within its views the plaintiff has no cause of action, we would also hold that he has no cause of action. We have no disposition to encourage persons who have no cause of action in their own state to come to Kansas and sue in this state with the possible intention of evading the laws of their own state, and because they may possibly believe that under the rules of law as administered in this state they might be allowed to recover, when they could not recover in their own state. Such would not be a proper administration of justice. If it be claimed, however, that we should take judicial notice of the common law of Arkansas, we would answer that we cannot do so.

6. Common law,
judicial notice of.

The courts of this state may take judicial notice of the common law of Kansas, and what it would be except for our own statutes or our own written law; and for this purpose our courts may take judicial notice of all the judicial decisions of this country and of all other countries which have adopted the common law of England. (*Hunter v. Ferguson*, 13 Kas. 463, 475, 476; *Division of Howard Co.*, 15 id. 194, 213; *City of Topeka v. Gillett*, 32 id. 431, 437.) But for the purpose that the courts of this state shall know as a fact in a particular case what the common law of some other state is, such law must be proved like any other fact. (*Porter v. Wells*, 6 Kas. 455; *Hunter v. Ferguson*, ante.) In Arkansas it is probable that a section foreman would be considered as a mere coëmployé, and in the same line of employment with a person assisting in operating a railroad train for the same employer; but such is not the view taken by this court. In the case of the *A. T. & S. F. Rld. Co. v. Moore*, 29 Kas. 633, 644; same case, 11 Am. & Eng. Rld. Cases, 243, 251, the section foreman, or section boss, as he is there called, is mentioned as a representative of the railroad company as between the railroad company and the train-men; and in that case as there reported, and in a subsequent decision of the same case, re-

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ported in 31 Kas. 197; 15 Am. & Eng. Rld. Cases, 312, it was held that the roadmaster, as between a railroad company and the train-men, is the representative of the company, and that the company is liable to such train-men for the negligence of the roadmaster. (See also note to last-mentioned case, 15 Am. & Eng. Rld. Cases, 315. See also the following cases, following in the same line: *H. & St. J. Rld. Co. v. Fox*, 31 Kas. 586; same case, 15 Am. & Eng. Rld. Cases, 325; *A. T. & S. F. Rld. Co. v. Holt*, 29 Kas. 149; same case, 11 Am. & Eng. Rld. Cases, 206. Also, in the same line, see the following cases: *Lewis v. St. L. & I. M. Rld. Co.*, 59 Mo. 495; *Dale v. St. L. K. C. & N. Rld. Co.*, 63 id. 455; *Hall v. M. P. Rly. Co.*, 74 id. 293; *Vautrain v. St. L. I. M. & S. Rly. Co.*, 8 Mo. App. 538; *L. & N. Rld. Co. v. Bowler*, 9 Heisk. 866; *Hardy v. N. C. C. Rld. Co.*, 74 N. C. 734; *Hardy v. C. C. Rld. Co.*, 76 id. 5; *Davis v. Rld. Co.*, 55 Vt. 84; same case, 11 Am. & Eng. Rld. Cases, 173; *C. & N. W. Rld. Co. v. Sweet*, 45 Ill. 197; *O'Donnell v. A. V. Rld. Co.*, 59 Pa. St. 239; *Cook v. St. Paul, M. & M. Rly. Co.*, 24 N. W. Rep. 311; *Kelly v. E. T. & T. Co.*, 25 id. 706; *Copper v. Louisville & C. Rly. Co.*, 2 N. E. Rep. 749; *Paulmier v. Erie Rld. Co.*, 34 N. J. L. 151; *H. & T. C. Rly. Co. v. Dunham*, 49 Tex. 181; *Snow v. Housatonic Rly. Co.*, 90 Mass. 441; *Brickman v. S. C. Rld. Co.*, 8 S. C. 173; *Col. C. Rld. Co. v. Ogden*, 3 Col. 499; *Thayer v. St. L. A. & T. H. Rld. Co.*, 22 Ind. 26; *Ind. Car Co. v. Parker*, 100 id. 181; *Atlas Engine Works v. Randall*, 100 id. 293; *Central Rld. Co. v. Mitchell*, 63 Ga. 173; same case, 1 Am. & Eng. Rld. Cases, 145; *Hough v. Rly. Co.*, 100 U. S. 213.)

There are two classes of cases in which the employés of the same master are not such coemployés that one of such employés may not recover for injuries caused by the negligence of another employé while all are engaged in transacting some portion or portions of the common master's business. The first class is where the negligent employé is one who has the general management of or control over some portion or line of the master's busi-

8. Master—when
liable, when
not.

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ness, and has control over the injured employé and the other employés engaged in that portion or line of business. A good illustration of this class is found in the case of *C. M. & St. P. Rld. Co. v. Ross*, 112 U. S. 377; same case, 17 Am. & Eng. Rld. Cases, 501. This is an extreme case, however, and is in conflict with the weight of authority in this country. See, also, and as another illustration of this class of cases, the case of the *L. & N. Rld. Co. v. Bowler*, 9 Heisk. 866, where it was held that the section boss and his subordinates were not fellow-servants with each other. This is another extreme case. These cases are not controlling in this case, however, even if they properly state the law; for although the section foreman in this case hired, controlled and discharged his subordinates, yet the plaintiff was not one of his subordinates and did not work with him or under him. The other class of cases where the employés of the same master are not considered such co-employés that the master will be liable to one employé for the negligence of another employé, is where two or more sets of employés are engaged in different lines of employment; as, for instance, where one set of employés has charge of a railroad train and its operation, while the other set is to keep the road in proper condition and repair. Numerous cases illustrating this class of cases have already been given. See last preceding page. It was said in the case of the *A. T. & S. F. Rld. Co. v. Moore*, 29 Kas. 644, as follows:

“It [the railroad company] was simply bound, through certain of its employés—the roadmaster and *section boss*, for instance—to use reasonable and ordinary care and diligence to keep its road in proper condition; and such employés, with respect to those who operate the road, represent the company, and indeed are the same as the company. In all cases, at common law, a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to

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or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and coemployés. *And at common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties above mentioned, which really devolves upon the master himself, then such officer, servant, agent, or employé stands in the place of the master and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence."*

In the present case the roadmaster, the division roadmaster and the section foreman and his assistants were in one line of duty, while the train-men were in another and a different line of duty, and each set within its own line of employment represented the master as to the other set; and the members of one set were not the mere *fellow-servants* with the members of the other set. The principal ground upon which the doctrine has been established that the master is not liable for any negligence that might take place as between mere fellow-servants is, that such fellow-servants work together in the same line of employment, are intimately acquainted with each other, and knowing each other better than the master could possibly know any one of them, they take all risks of negligence on the part of their fellow-servants; that if any servant chooses to work with a known incompetent or negligent fellow-servant, without informing the master, he himself should take all the risks and consequences of his fellow-servant's negligence and incapacity, the master being required only to use reasonable and ordinary care and diligence in the original employment and the subsequent retention of only such servants as are competent and habitually careful. (*Dow v. K. P. Rly. Co.*, 8 Kas. 642, 646.) But where employés work in different lines of employment, one having no means of knowing anything about the business or qualifications of the other, and being wholly unacquainted with the other, they cannot be said to be fellow-servants within the meaning

5. Section boss and engineer, not co-employés.

of the foregoing rule; and this state of things fairly represents the condition of a railroad section foreman and an engineer on a freight train, and the relation existing between them. Therefore, where a railroad company delegates, directly or indirectly, to a section boss or section foreman the duty of keeping a certain section of the railroad in proper condition and repair, and to warn train-men in case of danger, and the section boss fails to perform his duty in these respects, and a train-man is injured by reason of such negligence, the railroad company is responsible.

It is claimed that the court committed error in the conduct of the trial of this case in many particulars. One of the first errors of this kind complained of is, that the court admitted the testimony of J. R. Ward, the division roadmaster, with respect to statements made by James Dun, the defendant's chief civil engineer. These statements were made prior to the time of the occurrence of the accident, and were made while Ward was the division roadmaster for that division of the defendant's railway, and while Dun was the defendant's chief civil engineer. The statements of Dun were brought about in the following manner: Dun asked Ward if the heavy rains at any time had given Ward any trouble at the place where the accident occurred, and Ward told him that they had never had any trouble there; and Ward then made the statements complained of. The testimony of Ward showing this, reads as follows: "He [Dun] asked me the question if the heavy rains at any time had given me any trouble there." "I told him we had never had any trouble there with high water. He said that he had been uneasy about that place; that he had been detained there by high water when locating the road." At the time when this conversation occurred between Dun and Ward, it was the duty of Dun to see that the railway was properly constructed, and it was the duty of Ward to see that that division of the railway was in proper condition and repair; and this conversation was really a consultation, a conference concerning matters within the line of their duty, the conversation itself was within the line

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of their duty, and the declaration of Dun formed a part of the consultation, a part of the *res gestæ*. The purpose of introducing this evidence was to show that the railway company had notice of the character and condition of its railway and of the danger at the place where the accident subsequently occurred; and as it was the duty of the chief engineer and the division roadmaster to see that the road was safe and in proper condition, notice to them was notice to the defendant. Authorities showing that the declarations of agents, not made while in the performance of the agent's duty nor forming any part of the *res gestæ*, have no application to this case. The following cases we think have application to this case: *Brehm v. C. W. Rly. Co.*, 34 Barb. 257, 275; *B. & O. Rld. Co. v. State of Maryland*, 19 Am. & Eng. Rld. Cases, 83; *L. N. A. & C. Rly. Co. v. Henley*, 88 Ind. 535, 539; same case, 12 Am. & Eng. Rld. Cases, 301-304; *Baldwin v. St. L. K. & M. Rly. Co.*, 25 N. W. Rep. 918; *Locke v. S. C. & P. Rld. Co.*, 46 Iowa, 109; *M. D. T. Co. v. Leysor*, 89 Ill. 44; *Col. Cen. Rld. Co. v. Ogden*, 3 Col. 499; *McGenness v. Adriatic Mills*, 116 Mass. 177; *National Bank v. Stewart*, 5 S. C. Rep. 845; *C. B. U. P. Rld. Co. v. Butman*, 22 Kas. 640, 642; *K. P. Rly. Co. v. Little*, 19 id. 267, 272. We cannot say that the court below erred in permitting the statements of Dun to be given to the jury.

9. Evidence—con-
versation be-
tween civil
engineer and
roadmaster, no
error in admit-
ting.

It is further claimed by the defendant below, plaintiff in error, that the court below erred in permitting the plaintiff below to impeach one of his own witnesses. It is possible that the court below committed a slight error in this respect, but still a matter of this kind is so largely within the sound judicial discretion of the trial court, that we cannot say that any reversible error was committed in the present case. There was no attempt to impeach the witness generally, or to impeach his evidence generally, but the only attempt was to show that he had made a statement out of court, and by a letter to the plaintiff, which was different from his testimony upon a particular subject in

10. Impeachment
of party's own
witness.

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court. The supposed error arose as follows: D. Workman was the fireman on the plaintiff's engine at the time the accident occurred. The plaintiff introduced him as a witness for the purpose of proving that the train was not moving at the time the accident occurred at a speed greater than from twelve to fourteen miles an hour, but he testified that the train was moving at that time at the rate of from fifteen to eighteen miles an hour. The plaintiff then, for the purpose of impeaching this testimony, introduced a letter from Workman to the plaintiff, in answer to a letter from the plaintiff to Workman, in which first-mentioned letter Workman stated that the train was moving at the time only at the rate of from twelve to fourteen miles an hour. The plaintiff had also taken the deposition of Workman, in which he testified that the train was moving only at the rate of from ten to fourteen miles an hour; but as Workman was present at the trial the plaintiff could not introduce the deposition as original evidence. If the court erred at all, it was in not requiring the plaintiff to show by stronger evidence than he did that the plaintiff was surprised at Workman's testimony. But taking all the testimony together, and the fact that this testimony is of but little importance in the case, we cannot say that the court below so abused its discretion or committed such material error in permitting the plaintiff to impeach his own witness, that the judgment of the court below must be reversed therefor.

The plaintiff in error, defendant below, also claims that the court below committed error in permitting the plaintiff to introduce evidence showing that the defendant, after the culvert was washed out, put in another culvert or bridge of greater dimensions, so as to permit a greater amount of water to pass through. The defendant can hardly claim that this was a material error, for the defendant also proved the same fact. And if error at all, it was a very slight and trifling one under all the facts of the case. But was it error? The making of the passage-way larger than it had formerly been was an admission, slight it may be, and of but little value, but still an

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admission, on the part of the defendant that the passage-way had previously been too small. And why might not the jury consider such evidence for what it was worth? Many authorities sustain the introduction of this kind of evidence. (*St. J. & D. C. Rld. Co. v. Chase*, 11 Kas. 47; *A. T. & S. F. Rld. Co. v. Retford*, 18 id. 249; *City of Emporia v. Schmidling*, 33 id. 485; *W. C. & P. Rld. Co. v. McElwee*, 67 Pa. St. 311, 314; *K. P. Rly. Co. v. Miller*, 2 Col. 443, 468, 469; *O'Leary v. City of Mankato*, 21 Minn. 65; *Phelps v. City of Mankato*, 23 id. 279; *Kelley v. S. M. Rly. Co.*, 28 id. 98; *Brehm v. C. W. Rly. Co.*, 34 Barb. 256; *Westfall v. Erie Rly. Co.*, 5 Hun, 75; *Sewell v. City of Cohoes*, 11 id. 626; *Harvey v. N. Y. C. & H. R. Rld. Co.*, 19 id. 556; *Readman v. Conway*, 126 Mass. 374.) It is evidence in the nature of an admission from conduct; and many illustrations of such kind of evidence might be given. It is frequently resorted to in criminal cases. The

11. Repairs after accident, as evidence.

evidence of this change in the dimensions of the water-way does not of itself prove negligence; it does not prove that the railway company had notice of the insufficiency of the culvert prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence. It at most only tended to prove by way of admission and as a fact that the culvert was too small, and that the company obtained knowledge of the same, *not before, but after* the accident. Of course the change of any structure or appliance, to be of any value as evidence, must be made soon after the accident, and seemingly have some connection therewith. This is so held by some of the following authorities, while others of the following authorities hold that the evidence is *wholly incompetent under all circumstances*: *Salters v. D. & H. Canal Co.*, 3 Hun, 338; *Payne v. T. & B. Rld. Co.*, 9 id. 526; *Baird v. Daly*, 68 N. Y. 547; *Dale v. D. L. & W. Rld. Co.*, 73 id. 468; *Morse v. M. & St. L. Rly. Co.*, 30 Minn. 465; same case, 11 Am. & Eng. Rld. Cases, 168; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. C. & N. W. Rld. Co.*, 59

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id. 581. We do not think that the court below committed error in admitting the foregoing evidence.

We do not think that the court below committed material error, or any error, in refusing to permit evidence to be introduced with regard to the speed-register. It was not sufficiently identified, nor was any sufficient preliminary evidence introduced to authorize its introduction. Neither do we think that any of the instructions to the jury were materially erroneous. If we should put the same construction upon some of the instructions given to the jury as the plaintiff in error, defendant below, does, we should have to hold them erroneous. The plaintiff in error claims that by some of the instructions a railway company is required to guarantee the sufficiency, good

12. Railroad company to keep track and roadway safe.

order and good condition of its track and roadway. Of course such is not the law. The law merely requires that railway companies shall exercise reasonable and ordinary care and diligence to keep their tracks and roadways in a reasonably safe condition. (*A. T. & S. F. Rld. Co. v. Wagner*, 33 Kas. 660; same case, 21 Am. & Eng. Rld. Cases, 637; *A. T. & S. F. Rld. Co. v. Ledbetter*, 34 Kas. 326; same case, 21 Am. & Eng. Rld. Cases, 555.) But taking the entire charge of the court, it is evident that the court did not intend to instruct the jury as the plaintiff in error claims. On the contrary, we think the court intended to instruct the jury that the law is just as we have stated it to be. But even if the court had instructed the jury as the plaintiff in error claims, still, under the findings of the jury, the error would be immaterial; for the jury found that the injuries resulted not only from the negligence of the defendant below in the improper construction of the water-ways, but also in the negligent failure of the section foreman to pass over his section of the railway before the accident occurred, and to warn the train-men of the danger; and as before stated, it is the opinion of this court that the railway company is responsible to the train-men for the negligence of the section foreman. Neither do we think that it makes any difference

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that the defendant did not originally construct its railway. It is true of a great many railroad companies, that they do not construct their own roads; but nevertheless, a railroad company must exercise reasonable and ordinary diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same. Neither did the court commit any material error in refusing to give instructions. Some of the instructions asked for by the defendant and refused, are not good law, or proper in the case. Some of them were substantially given in the general charge of the court, and some of them were rendered wholly immaterial by the special findings of the jury. All the material findings of the jury were sustained by sufficient evidence; and while we might agree with the plaintiff in error, defendant below, that the verdict of the jury is excessive, yet it is not sufficiently excessive to authorize a reversal of the judgment of the court below, when the trial seems otherwise to have been fair.

The judgment of the court below will be affirmed.

JOHNSTON, J., concurring.

HORTON, C. J.: I place my affirmance of the judgment of the district court, in this case, upon the following grounds: The petition of Weaver alleges, among other things, that his injury was caused by the carelessness and negligence of the section foreman of the railway company in failing and neglecting to go over the railroad track after a heavy and severe storm which occurred along the road on the night of the 18th of May, 1883, to ascertain whether any damage had been done thereby to the road-bed, and for failing and neglecting to notify Weaver and other employes of the railway company upon the train with Weaver of the wash-out, as it was his duty to do, and which, in the reasonable discharge of his duties, he should have done, and which, if so done, would have prevented the injury inflicted. The evidence shows that Charles Downing was the section foreman in charge of the road-bed where Weaver was injured. He had been in charge

St. L. & S. F. Rly. Co. v. Weaver.

of his section from six to nine months. There was a severe rain-storm on the night that Weaver's engine was derailed, some of the witnesses stating that the rainfall was unprecedented. It commenced raining at Downing's section-house about five o'clock in the evening, and rained up to eleven or twelve o'clock—perhaps later. The storm ceased before two o'clock. The injury occurred about three o'clock in the morning. The road-bed where Weaver's engine was derailed was washed out for a great distance. The section-house where Downing, the section foreman stopped, was three or four miles from the wash-out. In the section-house the foreman and two section-men slept, and at this house there was a hand-car, lanterns, torpedoes, signals and tools for inspecting and repairing the track, and implements for giving signals to trains, etc. C. W. Rogers, the general superintendent of the railway company, testified that the general orders of his company in relation to section foremen going over the road were that "they were to precede every passenger train, and in case of heavy or extraordinary storms, to go over the road carefully before any train." Among other rules upon the time-card of the railway company, were the following:

"During the continuance, and after storms of rain, wind, or snow, section foremen will always be required to see that the track is not obstructed by fallen trees, driftwood, brush, stones, etc., and to precede each passenger train run in the night by sending two or three men over their section with their hand-cars and lights to see that the track is clear, and if necessary, notify trains of any obstruction or defect. This rule will be strictly enforced against section foremen."

"All persons employed upon the road must give timely notice of any obstruction to the passage of trains, by exhibiting a flag, etc., and must notify all passing trains."

The jury found, upon the evidence before them, that Downing had charge of keeping the track in repair where Weaver was injured; that he could have gone from his section-house to the place of the wreck in twenty minutes and discovered the wash-out; that it was his duty, in time of heavy rains, to inspect the road and report to the train-men and officers of

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the road any defects therein; that he neglected and failed to go over the road during and after the severe storm which prevailed before the engine was derailed, and neglected and failed to give the men on the train notice of the wash-out. If Downing had performed his duty and gone over the road before the arrival of the train drawn by Weaver's engine, he would have had knowledge of the wash-out and could have put out danger signals so as to have stopped the train, and thereby prevented the wreck. The derailment of the engine, the wreck of the train, and the injury to Weaver, were caused by Downing's negligence. He, as the section foreman, did not bear the relation of fellow-servant or mere coëmployé in the same line of employment with Weaver, the engineer. He represented the railway company, and the company is responsible to Weaver for the injuries which, through his negligence, were inflicted upon him. If a section foreman, under the decisions of Arkansas, where Weaver was injured, is regarded as a servant or coëmployé in the same employment with the engineer operating an engine, such decisions should have been introduced in evidence, as stated in the above opinion. In the absence of any evidence of such a construction of the common law by the Arkansas courts, this case must be disposed of upon the interpretation given in this state to the rule of the common law. The burden of proof that Weaver was guilty of contributory negligence was upon the railway company. Upon this question, the findings and judgment were against the company. There is evidence to support these findings, and therefore it cannot be said that Weaver was guilty of negligence.

JOHN V. HAVERTY v. ALICE HAVERTY.

1. **DIVORCE, Procured by Fraud; Review.** Where an action is commenced by a defendant within six months after the rendition of a decree of divorce to vacate the same upon the charge of the fraud of the plaintiff, and in such case a judgment is rendered against the defendant, a subsequent proceeding to review said judgment may be commenced in the supreme court within one year after its rendition. (Laws of 1881, ch. 126, § 2.)
2. **ATTORNEY AND CLIENT; Good Faith.** An attorney, when acting for his client, is bound to the most scrupulous good faith. If he corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So, also, if a plaintiff is guilty of so influencing the attorney of the defendant, by the payment of money, without the knowledge or consent of his client, as to make it the interest of said attorney that plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any resistance to the rendition of the judgment in favor of the plaintiff, a new action may be sustained by the defendant to set aside the former judgment and open the case for a new and fair hearing.

Error from Johnson District Court.

ON January 15, 1883, *Alice Haverty* filed her petition in the district court of Johnson county, in this state, asking a decree of divorce against *John V. Haverty*, on the following grounds, to wit: First, gross neglect of duty; second, extreme cruelty and inhuman treatment; third, abandonment for more than one year; and demanded the custody of George W. Haverty, a minor child, and asked that John V. Haverty be debarred of all interest in her property. At the time the action was commenced and during all the time it was pending, until after the decree was rendered as prayed for in the petition, John V. Haverty was absent from the state and in the state of Colorado. After the commencement of the action, John V. Haverty employed F. R. Ogg, a practicing attorney of Johnson county, to make a defense therein, and Ogg prepared an answer, containing a full and complete defense to the petition, forwarded it to John V. Haverty at Pueblo, Col., who

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verified it and returned it to his attorney, by whom it was filed in court. On June 28, 1883, the action was tried by the district court, and judgment rendered granting Alice Haverty a divorce and the custody of the minor child, George W. Haverty, conditioned, however, that the said John V. Haverty be allowed to see the child at all suitable and proper times. The judgment also barred John V. Haverty of all interest in the real estate described in the petition, but provided as follows: "By agreement in open court, Alice Haverty is to pay to the clerk of the court the sum of \$100 alimony to John V. Haverty."

On December 21, 1883, within six months from the rendition of the judgment of June 28th, John V. Haverty commenced this action in the district court of Johnson county, against Alice Haverty, to set aside that judgment, upon the following grounds: First, because he was prevented by unavoidable casualty and misfortune from appearing and making a defense at the trial; second, because the judgment was obtained by falsehood, collusion and fraud practiced by and on the part of Alice Haverty.

Alice Haverty filed her answer, containing a general denial of the allegations in said petition, and the case was tried on June 25, 1884, by the court without a jury, and judgment rendered in favor of Alice Haverty and against John V. Haverty. Haverty then filed his motion for a new trial, which was overruled. The witnesses examined on the trial of the divorce case were Alice Haverty and her mother, Mrs. Bowen. F. R. Ogg, attorney for John V. Haverty, was present at the trial, but did not cross-examine either of the witnesses. He accepted the \$100 mentioned as alimony in the decree of divorce. John T. Burris, the attorney for Alice Haverty, testified upon the trial of this case, in regard to the payment of this \$100, as follows:

"I am acquainted with the parties to this suit, and am one of the attorneys for the defendant in this action. I was attorney for the plaintiff in the case of Alice Haverty v. John V. Haverty, and was present at the trial of said action at the

Haverty v. Haverty.

June, 1883, term of the Johnson county district court. I examined the witnesses on the part of the plaintiff on said trial. The plaintiff and her mother, Mrs. Bowen, were examined on the part of the plaintiff, and no other witnesses were produced on the part of the plaintiff, unless her sister, Mrs. Hadley, was examined, and I do not recollect certainly whether she was examined, or not. The principal witness was plaintiff. Mr. Ogg, the attorney for defendant, was present at the trial. No witnesses were produced or examined on the part of the defendant, and my recollection is that Mr. Ogg did not examine the plaintiff's witnesses. I don't remember that he asked any questions. I had a conversation with Mr. Ogg before the trial, and we agreed that the plaintiff should pay \$100, to be paid to the defendant's attorney, and that the plaintiff could take judgment in her favor—the defendant to make no defense in the case. I had several conversations with the defendant's attorney, and the matter came on by degrees, and we finally made the agreement for the payment of the \$100. Mr. Ogg said that Haverty owed him his fee in the case, and owed Julien & Mahaffie a livery bill, and also owed a note, on which he (Ogg) was surety, and that the \$100 would not more than pay the three claims, and that the claim of Julien was in his hands for collection. I understood that the \$100 was to be applied to the payment of these three claims. Ogg said that if we would pay the \$100, he would not make any defense, and would not ask for a continuance, but that if we would not do that, he would have to apply for a continuance. He did not claim to have authority from Haverty to compromise the case. Ogg said that he had not heard from Haverty for some time, and that Haverty had not answered his letters."

(Cross-examination.)

"Mr. Ogg said that the claim of Julien was in his hands for collection. He said that Haverty had an interest in the plaintiff's land and I paid the \$100 to prevent a continuance. Ogg said he had not heard from Haverty for some time, and was not ready for trial, and would have to apply for a continuance. I was afraid of a successful application for a continuance, or I would not have paid the \$100. It was paid to prevent a continuance.

"Q. What was the \$100 paid for? Was it paid as alimony, or in lieu of improvements on the land?

"A. It was paid in lieu of improvements. Ogg did not agree in those words that he would not make any defense, but

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it was my understanding that there would be no contest if the \$100 was paid. I understood the \$100 was to be applied to meet the three obligations, and did not understand that any of it was to be paid to Haverty himself."

J. B. Marshall, clerk of the district court of Johnson county, testified :

"I was present at the trial of the case of Alice Haverty v. John V. Haverty. I think the plaintiff and her mother were sworn and examined as witnesses on the part of the plaintiff. I do not think that any other witnesses were examined on the part of the plaintiff. No witnesses were examined on the part of the defendant. Mr. Ogg appeared as attorney for the defendant. He did not cross-examine any of the witnesses. After the judgment, Col. Burris, attorney for Alice Haverty, paid me \$100 to be paid to Mr. Ogg, attorney for the defendant, and I paid the \$100 to Mr. Ogg. Mr. Ogg made no objection to the plaintiff taking the decree. Mr. Ogg agreed with the attorneys for the plaintiff that if they would pay him \$100, he would make no objection to their taking their decree. After the evidence was offered and when the plaintiff took judgment, the attorneys stated to the court that they had agreed to an order for the payment of \$100 by plaintiff to defendant as alimony. The judge remarked that he knew nothing of any such arrangement, and would not make any order of the kind. I do not recollect the evidence offered on the part of the plaintiff."

F. R. Ogg was introduced as a witness for the defendant, Alice Haverty, and testified as follows :

"I was attorney for John V. Haverty in the case of Alice Haverty v. John V. Haverty. I was employed in the case about February, 1883. Haverty was in Pueblo, Colorado, and I received the first letter from him from Pueblo about that time. I think I have not this letter. The first letter I have now from Haverty is dated March 24, 1883. I know that I received other letters before I received it. I received four letters from him, all from South Pueblo. I do not know that he ever left there. The date of the last letter I now have is April 8. I think it is the last I received from him, but I am not positive. I wrote to him after that, and stated that the case would be called in June, that I wanted a list of the witnesses, and that I could not go to trial very well without him. It was a short letter, and I received no answer. I

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went to Mr. Hadley and to Mr. Julien and made inquiry about him; I also went to Patrick, who knew him in South Pueblo. Patrick stated that he had gone to the Red Mountain country. I wrote to him again at South Pueblo, and stated in the letter that it was necessary for him to be here. I addressed the letter to Pueblo. This letter was returned. I have not this letter. I have two of the letters I received from him, and they are the ones that have been read in evidence. I do not know where the others are. One was prior and one subsequent to the letters I have. I don't know where these letters are; I think they were both received before the two I have, but I am not sure about this. I have made search for these letters. The first letter said he did not want the exposure of a trial, that he only wanted the custody of his little boy; that he cared only for his child; that he did not believe he could live with his wife again. He said to do the best I could for him. I never informed him it would not be necessary for him to be here at the time of trial. He said he had no money. I asked for a list of his witnesses in one of the letters. He never furnished me the list. I had no conversation with anyone for the plaintiff but Col. Burris. I had no defense to make at the June term. The issues were made up after the March term. At the June term I did not believe I could make a showing. I told Burris that Haverty had made improvements, and ought to have pay for them. I wanted to make the payment of the \$100 a matter of record.

"Q. What was the \$100 paid for?"

"A. It was paid in consideration of the improvements on the place. It was not paid in consideration of my not applying for a continuance or of my not making a defense.

"I would not consent to an order giving her exclusive control of the child, but had a condition inserted in the order that Haverty was to have the privilege of seeing the child."

(Cross-examination.)

"I applied the \$100 in payment of a note on which Julien and I were sureties, on a livery bill Haverty owed Julien & Mahaffie, and on my fee. Haverty never authorized me to apply the money in satisfaction of these claims, and I had no orders or authority from him to settle any of his debts. Haverty did not receive any of the \$100. I never informed Haverty what I had done in the case, or how I had expended the \$100, and never accounted for it to him. The first time I saw Haverty after this trial was in Olathe, in November, 1883. He refused to speak to me. He never explained to me why

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he did not write to me. He never authorized me to make any compromise of the case, or to receive the \$100, and he never told me he did not want me to make any defense. At the June term I found the plaintiff insisting on a trial. I could not learn defendant's address, and thought the only question was to obtain a favorable decree. I did not see defendant until after the June term expired."

Alice Haverty testified :

"I had no conversation with Ogg about the compromise of the case of Alice Haverty v. John V. Haverty at the June, 1883, term of the district court, or about the payment of the \$100. The only conversation I had about the matter was with my attorneys. I paid the \$100 as alimony.

"Q. What did you pay the \$100 alimony for? A. I was willing to allow him \$100 for improvements, and paid the \$100 for that purpose."

William Julien testified :

"I received a letter from John V. Haverty early in the year 1883. He said he did not feel like fighting the woman, but wanted the care and custody of the child. I have looked all morning for this letter, but cannot find it."

(Cross-examination.)

"He said in the letter that he did not want to persecute his wife, but wanted the care and custody of his boy, George."

John V. Haverty excepted to the rulings and judgment of the court, and brings the case here.

A. L. Hayes, for plaintiff in error.

John T. Burris, *John T. Little*, and *Samuel T. Seaton*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: A preliminary question is presented in the motion filed by the defendant to dismiss this case, upon the ground that the petition in error was not filed within six months after the rendition of the judgment of divorce obtained by Alice Haverty against John V. Haverty. (Laws of 1881, ch. 126, § 1.) It appears from the record that the divorce was granted June 28, 1883. This action to vacate that

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judgment for fraud was commenced December 21, 1883, and the judgment rendered therein on June 25, 1884. The petition in error was filed on May 4, 1885—less than one year after the rendition of the judgment sought to be reviewed. This is not a proceeding to modify or reverse, by any order or judgment of this court, the decree of divorce, but the proceeding is one brought here to reverse the judgment of June 25. If that judgment, however, be vacated upon the ground that the decision of the trial court is not supported by the evidence, it will have the ultimate effect of setting aside the divorce. Section 1, of said chapter 126, provides, among other things:

“No proceeding for reversing or vacating the judgment or decree divorcing said parties shall be commenced unless within six months after the rendition of said judgment or decree, and during said six months and the pendency of said proceeding for reversing or vacating said judgment or decree, it shall be unlawful for either of said parties to marry, and any person so marrying shall be deemed guilty of bigamy: *Provided*, Such decree shall be final; and no proceedings in error to the supreme court shall be allowed or taken unless a notice of an intention to prosecute such proceedings in error be given in open court and noted on the journal of the court, within three days after the entry of the decree or judgment, and the petition in error and transcript be filed in the supreme court within three months after the rendition of such judgment or decree.”

This action for vacating the decree divorcing the parties was commenced within six months after the rendition of that decree. No proceedings in error were ever brought to the supreme court for reversing or vacating the decree of divorce, and no such petition in error is now pending. Therefore the motion to dismiss must be overruled. (Laws of 1881, ch. 126, § 2; Civil Code, §§ 568–575.)

An attorney owes to his client not only all the industry and application of which he is capable, but also, unshaken fidelity. He must be loyal in act and spirit to his client's interests. His loyalty should be unquestioned, above suspicion, and beyond reproach. An attorney not guilty of misconduct or fraud will be protected, when he acts to the best of his skill

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and knowledge, and of course is not answerable for every error or mistake. He is legally responsible to his client only for the want of ordinary care and ordinary skill; but he must conduct himself with honor and integrity. While the relation of attorney and client continues, the courts will carefully and zealously scrutinize the dealings and contracts between them, and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client. The client will also be relieved from any undue consequences resulting from the dealings between the attorney and himself, whenever the good faith of the contract does not clearly appear. An attorney, therefore, when acting for his

2. Attorney and
client; good
faith.

client, is bound to the most scrupulous good faith.

If he corruptly sells out his client's interest to the other side, a judgment thus obtained will be set aside, if proper proceedings are instituted. An attorney, as an officer of the court, holds a position with many privileges, and it is the solemn duty of the court to supervise the conduct of its officers and to discountenance every malpractice and abuse. The conduct of an attorney, when brought before the court for inquiry and consideration, ought to be scrutinized with the same exacting and rigid impartiality as if the question were between mere strangers to the bar. Perhaps every act should be more scrupulously weighed.

With this statement of recognized principles, we proceed to an examination of the evidence produced upon the trial. We think this evidence shows that the attorney of John V. Haverty entered into arrangements with the attorney of Alice Haverty about the time of the trial of her divorce case of such a character as to interfere with his exclusive devotion to the trust confided to him by his client. If Alice Haverty, through her attorney, prior to the trial of the divorce case, was guilty of so influencing the attorney of John V. Haverty as to obtain an undue and an unfair advantage, and thereon the judgment was thus obtained, such judgment ought to be annulled. As was said by Mr. Justice Miller, in *United States v. Throckmorton*, 98 U. S. 61:

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"Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently and without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing." (See also *Laiihe v. McDonald*, 7 Kas. 254.)

If we rely upon the evidence of the attorney of Alice Haverty, it appears that \$100 was paid to the attorney of her husband upon the agreement that she should take judgment in her favor and that the attorney would make no defense in the case for the husband, who was absent. This evidence is also supported by the clerk of the court, who testified that the attorney of Mr. Haverty "agreed with the attorney for Alice Haverty that if he would pay him \$100, he would make no objection to his taking a decree." This clearly brings the case within the rule that "where the attorney regularly employed corruptly sells out his client's interests to the other side, the judgment will be set aside." If, however, we look to the attorney of Mr. Haverty for an explanation of the evidence of Col. Burris concerning the payment of the \$100, we find this payment was made for the direct benefit of such attorney. It was applied to his own fees in the divorce case, to a livery bill in his hands for collection, and to a note on which he was surety. Haverty never received any part of the \$100. His attorney made no application for a continuance, and although present in the court at the trial, did not cross-examine either of the witnesses. Perhaps if he had made a searching cross-examination he might have succeeded in defeating the divorce, although his client was absent. With his consent, the decree of divorce recites that \$100 was paid by Alice Haverty as alimony. The attorney states that the \$100 was paid in con-

sideration of certain improvements made by Mr. Haverty upon the place owned by his wife. Considering the evidence of this attorney, his failure to cross-examine the witnesses, the judgment rendered, we cannot say that such attorney acted in good faith towards his client. After his arrangement with Col. Burris, it was his interest that Mrs. Haverty should obtain her divorce. Thereby he realized \$100. That interest was such, we think, as betrayed his judgment and endangered his fidelity. He certainly acted under a clear misapprehension of his professional duty. To such conduct we cannot give the sanction of this court. The practice of attorneys would be very impure and often fraudulent, if we permitted things of this sort to be done. Upon the evidence produced, the judgment of the trial court should have been for the annulment of the decree of divorce.

The judgment of the district court will be reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

All the Justices concurring.

35	447
48	632

A. & J. TROUNSTONE & CO. V. A. H. SELLERS.

1. **CONTRACT; Acceptance; Time.** Where a proposition to enter into a contract is made, and no time of acceptance is fixed by the party proposing, it must be accepted within a reasonable time.
2. **CONTRACT; Proposition by Letter; Prompt Reply.** Where a proposition to sell a stock of merchandise is made to a distant party by letter, in which he asks for an early response, the proposer has a right to expect a prompt reply through the mail, which is the usual mode of accepting an offer made by letter, or else by some other equally expeditious means.
3. **CONTRACT, Not Consummated.** A mere uncommunicated purpose to accept an offer does not constitute an acceptance, and where parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is

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not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing.

4. ——— *No Acceptance.* The mere determination to accept an offer received by letter, and the act of the party to whom it is made in starting on a journey with the intention of meeting the proposer and accepting the offer, where no notice of his intention is sent to or received by the proposer within a reasonable time, is no more than a mere mental assent, and does not amount to an acceptance.

Error from Franklin District Court.

REPLEVIN, brought by *A. & J. Trounstine & Co.*, to recover from *A. H. Sellers* the possession of a stock of ready-made clothing of the alleged value of \$2,085.20. It was tried at the January Term, 1885, without a jury, and findings of fact and law were made by the court, which are as follows:

"1. The plaintiffs are, and at the date of the several transactions hereinafter referred to were, copartners engaged in carrying on the wholesale clothing business at Cincinnati, Ohio. At the same time Samuel G. Moore and H. M. Weaver were copartners under the firm-name of Moore & Weaver, engaged in carrying on a general retail business at Ottawa, Kansas, in dry goods, clothing, etc. They continued such business up to December 15, 1884, when they executed certain mortgages on their stock as hereinafter specified.

"2. For the past four years John W. Fraser has been a traveling salesman for the plaintiffs. As such salesman he called at the store of Moore & Weaver, in Ottawa, in July, 1884, and solicited an order for clothing for the then approaching fall trade. Some conversation was had between Mr. Fraser and Moore & Weaver with respect to such order, but no agreement was made between them for the sale or purchase of goods.

"3. Afterward, about September 1, 1884, Mr. Weaver being about to proceed to Chicago to purchase goods for his firm, in pursuance to an understanding arrived at in the conversation at Ottawa, telegraphed the fact to Mr. Fraser, who thereupon met him in Chicago, Ill., for the purpose of renewing negotiations for Moore & Weaver's order for clothing.

"4. And thereupon, in the early part of September Mr.

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Fraser, as the agent for the plaintiffs, sold to Mr. Weaver for the firm of Moore & Weaver, the bill of clothing set out in the schedule annexed to the plaintiffs' petition, amounting, at the prices agreed upon, to \$2,085.20, upon the following terms, viz.:

"5. Moore & Weaver were to have a discount of 6 per cent. off the prices named, not later than ten days after January 1, 1885, and a credit was given them until the expiration of such period for discount.

"6. Immediately after obtaining the order for the goods, Mr. Fraser communicated the order and terms of sale to the plaintiffs, who thereupon selected and shipped the goods as ordered, to Moore & Weaver, at Ottawa, Kansas, who received the goods by due course of freight, opened the same, placed them on sale with their other goods in their store as part of their stock in trade, and proceeded to sell the same to their customers in the usual course of trade.

"7. From the receipt of such goods up to December 15, 1884, Moore & Weaver, in the course of their retail trade, sold out of said goods articles to the amount of \$756.25, estimated at the cost price thereof, leaving on hand of such goods the amount of \$1,328.95, estimated also at such cost price, which were taken under the order of replevin in this action.

"8. Mr. Fraser, as salesman for the plaintiffs, had authority to sell goods on four months' credit, and to allow a discount of 6 per cent. not later than ten days from the date of the sale, and 5 per cent. if paid in thirty days. The discount of 6 per cent. not later than January 1, 1885, allowed to Moore & Weaver, was however accepted and approved by the plaintiffs.

"9. On November 10, 1884, Moore & Weaver wrote a letter to the plaintiffs, claiming that they were to have a credit of four months on said bill from January 1, 1885, (if not discounted in ten days after January 1, 1885.) This letter was received by the plaintiffs, who thereupon, on November 14, 1884, answered by letter to Moore & Weaver, denying their claim, and insisting that the credit expired in ten days after January 1, 1885.

"10. On November 16, 1884, the letter from plaintiffs last mentioned having been received, Moore & Weaver replied by letter addressed to the plaintiffs, still insisting that by the terms of sale agreed upon with Mr. Fraser, they were to have the additional credit of four months from January 1, and adding: 'If you think we are misrepresenting the facts in the case, we will return the goods which we have on hand, and

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pay for what we have sold out of them. Hoping to hear from you soon, we remain,' etc.

"11. The last letter from Moore & Weaver was received by the plaintiffs a few days thereafter by the usual course of mail, but was never answered. (And the proposition therein made was never accepted, unless the demand for the goods herein-after stated was an acceptance.)

"12. On the 15th day of December, 1884, Moore & Weaver executed a mortgage on their entire stock of merchandise, including the goods purchased of the plaintiffs and remaining unsold, to Messrs. P. Lanning & Son and seven others, their creditors, to secure various sums due said creditors respectively, amounting in the aggregate to \$4,078.64. This mortgage was filed with the register of deeds on the day of its date, and on the morning of December 16, 1884, the mortgagees therein named took possession of the stock under their mortgage, and placed A. H. Sellers, defendant, in charge thereof as their agent and trustee to sell the goods and apply the proceeds on the mortgage debts. On the 16th day of December, 1884, Moore & Weaver executed a second mortgage on their entire stock to Messrs. Bates, Reed & Cooley and a number of others, (their creditors not named in the first mortgage,) to secure various sums due said mortgagees respectively, amounting in the aggregate to \$11,668.08. Among the mortgagees named in this second mortgage are the plaintiffs, A. & J. Trounstone & Co., and the mortgage recites an indebtedness to them of \$2,085.20. The plaintiffs did not know of its execution at the time it was executed. It was filed with the register of deeds of this county on the day of its date, and recites that it is subject to said first mortgage.

"13. On receipt of Moore & Weaver's letter of November 16, 1884, there were four members of plaintiffs' firm capable of traveling to Ottawa. Mr. John W. Harper attended to a great deal of the credit business, and was largely employed in traveling and settling up disputed claims. Important business matters of the firm in Indiana and Illinois demanding his immediate attention, he came to Ottawa as soon as he could after getting through with those matters, arriving here on the morning of December 16, 1884, at one o'clock A. M. On that day he found that the goods had been mortgaged as stated in the 12th finding, and made demand for the goods the same day.

"14. On the 16th of December, 1884, A. H. Sellers being in possession of the store and stock under the mortgage first above named, was proceeding to sell the goods and apply the

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proceeds on the mortgage, when Mr. John W. Harper of the plaintiff firm came to Ottawa and proceeded to identify the articles remaining unsold of the goods so sold to Moore & Weaver, and demanded the same of Mr. Sellers, who refused to yield possession. Thereupon, on December 17, 1884, the plaintiffs brought this action and replevied the goods. No redelivery bond having been given, the goods were turned over to the plaintiffs. A schedule thereof is attached to the sheriff's return. The goods so seized are a part of the goods sold by plaintiffs to Moore & Weaver.

"15. I find that the value of the property replevied was \$1,195.58 at the date that it was taken in this action."

CONCLUSIONS OF LAW.

"1. At the date of the commencement of this action, the defendant, A. H. Sellers, was entitled to the possession of the property taken under the order of replevin in this action, and did not wrongfully detain the same.

"2. The defendant is entitled to a return of the property so taken, or the value thereof, to wit, \$1,195.58, in case a return cannot be had; and judgment must be entered accordingly, and for costs, against the plaintiffs."

Upon the findings of fact and of law, the court rendered judgment in favor of the defendant that the property replevied in the action be returned to him, or in default thereof, that he recover of the plaintiffs \$1,195.58, the value of the property, together with the costs of suit. The plaintiffs excepted to the findings and judgment, and have removed the case to this court for review.

John W. Deford, for plaintiffs in error.

C. B. Mason, and *Edwin A. Austin*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: The right of possession to the clothing in controversy depends upon whether the proposition made to the plaintiffs by Moore & Weaver on November 16, 1884, was accepted and became a contract before the execution of the mortgages by Moore & Weaver to their creditors on the 15th day of December, 1884. It appears that the plaintiffs, who were engaged in the wholesale clothing business at Cincinnati,

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Ohio, sold on credit a stock of clothing through one of their agents, to Moore & Weaver, at Ottawa, Kansas. The goods were sold and shipped in the early part of September, 1884, upon the terms that Moore & Weaver were to have a discount of 6 per cent. off the prices named not later than ten days after January 1, 1885, and credit was given them until the expiration of that time for a discount. On November 10, 1884, Moore & Weaver wrote to the plaintiffs, claiming that if they did not choose to discount the bill within ten days after January 1, 1885, they were entitled to a credit of four months from that time. The plaintiffs answered this letter on the 14th of November, 1884, insisting that the credit did not extend beyond ten days after January 1, 1885. Moore & Weaver again wrote to the plaintiffs, on November 16, 1884, insisting on the additional credit of four months from January 1, and in closing their letter, stated: "If you think we are misrepresenting the facts in the case, we will return the goods which we have on hand, and pay for what we have sold out of them. Hoping to hear from you soon, we remain," etc. This letter was received by the usual course of mail, but was never answered. It seems that soon after the plaintiffs received the letter of November 16, Mr. Harper, one of their firm, started out from Cincinnati on a business trip, with the intention of attending to some important business matters of the firm in Indiana and Illinois, which demanded immediate attention, and with a view of coming on to Ottawa as soon as those matters were disposed of. He reached Ottawa on the evening of December 16, 1884, one month after the proposition was made, when he demanded the possession of the goods from the defendant Sellers, who was in charge of them under the mortgages executed the preceding day.

It is insisted by the plaintiffs that the court erred in not holding the conduct of the plaintiffs in starting from Cincinnati as an acceptance of the proposal made by Moore & Weaver, and as a completion of the contract, which vested the title and right of possession of the goods in the plaintiffs. In our opinion the conduct of the plaintiffs did not indicate a purpose to

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accept the proposal made by Moore & Weaver, and cannot be regarded as an acceptance. Although the proposition did not within itself limit the time or manner of acceptance, it cannot be regarded as a perpetual one, forever open to be accepted or rejected at the will of the plaintiffs. In *Mactier v. Frith*, 6 Wend. 103, the rule laid down with respect to a proposal made by letter is, that the offer continues until the letter containing it is received "and the party has had a fair opportunity to answer it." It has also been held that "a letter written would not be an acceptance so long as it remained in the possession or under the control of the writer. An offer then made through a letter, is not continued beyond the time that the party has a

1. Proposition
to contract;
acceptance.

fair opportunity to answer it." (*Averill v. Hedge*, 12 Conn. 423.) Upon receipt of Moore & Weaver's letter, the plaintiffs were bound "to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer." (*Chicago & G. E. Rld. Co. v. Dane*, 43 N. Y. 240. See also *Martin v. Black's Executors*, 21 Ala. 721; *Admr's v. Mocksley*, 2 Metc. [Ky.] 309; *Minn. Oil Co. v. Collier Lead Co.*, 4 Dill. 43; *Judd & Co. v. Day Bros.*, 50 Iowa, 247; *Taylor v. Rennie*, 35 Barb. 272; *Benjamin on Sales*, 61, note 7.)

The offer which was made was the result of correspondence through the mails, and as the dates of the letters indicate, they had been promptly answered and responded to by both the parties. Besides, the letter containing the proposal by its terms enjoined an early reply. It closes with the words, "Hoping to hear from you soon," etc. While the mode of acceptance was not indicated in the letter making the offer, the nature of the negotiations as well as the manner in which they were carried on, suggested not only the desire and necessity for an early reply, but also that the parties making the offer would expect an answer through and by the usual course of the mails. It has been said that —

"Where an individual makes an offer by post stipulating for, or by the nature of the business having the right to expect, an answer by return post, the offer can only endure for

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a limited time, and the making of it is accompanied by the implied stipulation that the answer will be sent by return post. If that stipulation is not satisfied, the person making the offer is released from it." (*MacLay v. Harvey*, 90 Ill. 525; *Dunlop v. Higgins*, 1 H. L. Cas. 387.)

If the plaintiffs intended to accept the proposal, it was their duty to have signified their acceptance, either through the mails or by some equally expeditious means.

^{2. Proposition by mail prompt reply.} The plaintiffs say that they determined to accept the proposition as soon as the offer was received, and that Mr. Harper's act in starting to Ottawa was an overt act amounting to an acceptance. Every overt act caused by a determination to accept a proposition does not constitute an acceptance. If it was the intention of the plaintiffs to accept the offer, they could and most likely would have written Moore & Weaver a letter, which was the usual mode of communication between the parties, and which is the usual mode of accepting an offer made by letter. Instead of sending a letter or telegram announcing a determination to accept, one of them started on a business trip through the country, intending finally to come to Kansas and take the goods, which trip consumed almost thirty days' time, during which time they were at liberty to change their purpose and reject the proposition. The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. "The assent must either be communicated to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication." (Benjamin on Sales, 54.) Where parties are distant, and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then,

^{3. Contract, not consummated.}

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unless the offer is still standing. (See authorities above cited.) The action of the plaintiffs in sending a member of the firm by a circuitous route to Kansas, was no more
 4. No acceptance. than a mere mental assent, which, as we have seen, is insufficient. There was no act of acceptance until Harper arrived at Ottawa and demanded the goods. This was not within a reasonable time, and when the proposition was not met within a reasonable time, Moore & Weaver were at liberty to regard their proposition as rejected, and to make other disposition of their property, which they manifestly did do.

In regard to the objections made to the findings of fact, it is enough to say that after an examination of the record, we think they conform to and are supported by the testimony.

Finding no error in the record, the judgment of the district court will be affirmed.

All the Justices concurring.

T. EWING MILLER V. ALICE MADDEN, *et al.*

IMPROPER TAX SALE; Injunction; Insufficient Tender of Taxes. Where two lots of land were assessed in 1880 for taxation, separately, and at different valuations, and were advertised in the same manner, but were not offered separately at the tax sale, but instead thereof were improperly sold as one tract only, and subsequently the owner of the lots brings an action to enjoin the issuance of a tax deed on account of the irregular sale, *held*, that before he is entitled to the injunction prayed for, he must pay or tender the full amount of taxes and charges, with interest thereon at the rate of twenty-four per cent. per annum. (Comp. Laws of 1879, ch. 107, § 127.) *Held, further*, That the owner of the lots so sold for taxes cannot redeem his lots or enjoin the issuance of a tax deed on the tax sale by tendering the taxes and charges with only ten per cent. interest thereon, even if he first calls the attention of the board of county commissioners of his county to the error or irregularity existing in the tax sale, and applies to the board for an order directing the county clerk not to convey the lots, if such application is refused by the board and no order made concerning the return of the tax certificate, or the setting of the same aside.

Error from Montgomery District Court.

THE opinion states the nature of the action, and the facts. To plaintiff's petition defendants *Madden* and *Conrad* filed a demurrer, which on April 3, 1885, was sustained by the court. The plaintiff *Miller* brings the case to this court.

J. D. McCue, for plaintiff in error.

Wm. Dunkin, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: *Miller* filed his petition against *Alice Madden*, and *H. W. Conrad* as county clerk of *Montgomery* county, alleging, among other things, that he is the owner of lots eight and nine in block fifty-four, in the city of *Independence*, in that county; that lot eight was assessed for taxation in 1880 at \$1,000, and lot nine at \$1,105; that the lots were advertised in the tax list in the same manner; that in September, 1881, the lots were sold together to the defendant, *Alice Madden*, for the delinquent taxes of 1880; that afterward *Alice Madden* paid the delinquent taxes on the lots for 1881, 1882, and 1883, and had the same indorsed on her tax certificate; that in July, 1884, the plaintiff appeared before the board of county commissioners of his county and called to their attention the fact that the lots had been assessed separately and improperly sold together for the taxes of 1880; that he asked the board, for this error or irregularity, under the provisions of § 145, ch. 107, Comp. Laws of 1879, to order the county clerk not to convey the lots; that the board refused to make the order; that on August 7, 1884, he tendered to *D. Madden*, for *Alice Madden*, and also the treasurer of his county, all the taxes, penalties and costs due thereon, with interest on the amount at the rate of ten per cent. per annum.

The defendants filed a demurrer to the petition, which, upon the hearing thereof, was sustained by the court. The plaintiff elected to stand by his petition, and brings the case here.

The question presented is, conceding the facts stated in the

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petition are sufficient to avoid the tax-sale certificates issued upon the sale of the lots, is the plaintiff entitled, upon the tender made by him, to an injunction against the issuance of any tax deed? The plaintiff insists that the ten per cent. added to the taxes and charges paid by the purchaser at the tax sale is all that can be required to be refunded, and that his tender was sufficient. The defendants claim that he should have tendered interest upon the taxes and charges at the rate of twenty-four per cent. per annum, and therefore that the tender was insufficient. The plaintiff insists that as he discovered to the board of county commissioners the error or irregularity existing in the tax sale and applied for an order that the county clerk be directed not to convey the lots, and tendered the amount paid upon the sale, together with the subsequent taxes and charges paid thereon, with interest on the amount at the rate of ten per cent. per annum, the board should have granted his application, accepted the money tendered by him, and turned the amount over to Alice Madden. Said § 145 reads as follows:

“If the county treasurer shall discover before the sale of any lands or lots for taxes, that on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon any sale, the board of county commissioners shall discover that, for any error or irregularity, such lands or lots ought not to be conveyed, they may order the county clerk not to convey the same, and the county treasurer shall, on the return of the tax certificate with a certified copy of such order of the board of county commissioners, refund the amount paid therefor on such sale, and such of the subsequent taxes and charges paid thereon by the purchaser, or his assigns, as may be so ordered by the board of county commissioners, out of the county treasury, with interest on the amount so ordered refunded, at the rate of ten per cent. per annum; and in all cases in which actions shall be now pending or may be hereafter commenced, the refusal of the county clerk to convey any lands or lots indorsed on any tax certificate shall not be deemed or held to constitute *prima facie* evidence of any irregular assessment or other error for which such land or lots ought not to be conveyed, nor

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shall any judgment be recovered against such county, or the board of county commissioners thereof, or liability held to attach therefor, under or by virtue of provisions of said section one hundred and forty-five, as heretofore or hereafter existing, or of section one hundred and twenty of chapter one hundred and seven of the general statutes, except in cases in which the board of county commissioners shall have made an order for the refunding thereof, and then only for the amount specified in the order for such refunding, and in all cases in which invalid taxes shall be included in such certificate, and only to the extent of such invalid taxes, with ten per cent. interest thereon."

We need not decide, however, in this case, whether the granting of the order applied for was a matter of discretion, or a matter of absolute right. The board of county commissioners made no order for the county clerk not to convey the lots. The county treasurer did not refund to Alice Madden the amount paid by her on the tax sale, or any other sum. The board of county commissioners made no order for the treasurer to pay to her any moneys whatever. If the plaintiff was entitled to the order he sought from the board of county commissioners, his remedy is by mandamus, not injunction. If the board has not performed its duty he must seek another remedy than injunction. In any view, injunction will not lie in such a case as this, where the antecedent statutory relief has been refused by the board. The case, therefore, stands as if the plaintiff never made any application to the county board for an order to the county clerk not to convey the lots. It is the same as if the board of county commissioners had never discovered any error or irregularity in the tax sale complained of.

The tender made was insufficient, and the demurrer to the petition was properly sustained. (*Gulf Rld. Co. v. Morris*, 7 Kas. 211; *Hagaman v. Comm'rs of Cloud Co.*, 19 id. 394; *Wilson v. Longendyke*, 32 id. 267; *Knox v. Dunn*, 22 id. 683.)

The judgment of the district court will therefore be affirmed.

All the Justices concurring.

M. R. BARKER v. W. E. CRITZER.

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SPECIFIC PERFORMANCE; Action, Not Maintained. On June 26, 1884, A. N. Hanna deposited \$50 with the First National Bank of Emporia, Kansas, and received the following instrument in writing, to wit:

"FIRST NATIONAL BANK OF EMPORIA, KANSAS.—Deposited for account of A. N. Hanna, 6—26, 1884, currency \$50, being deposit to apply upon purchase of north half of northwest quarter 84—20—9, Chase county. If Critzer furnishes good and sufficient warranty deed in thirty days, said Hanna is to pay the remaining three hundred and fifty dollars inside thirty days from this date. If Hanna does not so pay, then this money to be forfeited to Critzer. If Critzer does not furnish said deed in thirty days, then this fifty dollars returned.—A. N. HANNA.

Dup.

Cross.

Title to be passed upon by J. J. Buck, at Hanna's expense.

Dup.

Cross."

Hanna was the agent of M. R. Barker, and Cross was the agent of W. E. Critzer. Critzer owned ten-fourteenths of the above-described land, and the other four-fourteenths belonged to minor heirs, which four-fourteenths Critzer expected to purchase from the guardian of the minor heirs by virtue of proceedings in the probate court; and afterward he did so purchase the same; but he never executed any deed for the property to either Hanna or to Barker, and the fifty dollars have never been returned to Hanna or to Barker. *Held*, That Barker cannot maintain an action to compel Critzer to convey the property to him.

Error from Chase District Court.

ACTION by Barker against Critzer, to compel the specific performance of a certain contract. At the April Term, 1885, the court sustained defendant's demurrer to plaintiff's petition, and rendered judgment against him for costs. The plaintiff brings the case here. The opinion states the facts.

Ed. S. Waterbury, for plaintiff in error.

C. N. Sterry, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by M. R. Barker in the district court of Chase county, against W. E. Critzer, to compel the specific performance of an alleged contract for the sale and conveyance of certain real estate. The de-

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defendant demurred to the plaintiff's petition, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court below. The plaintiff brings the case to this court.

It is alleged in the plaintiff's petition in the court below, that on May 2, 1884, and afterward, the defendant was the owner of the undivided ten-fourteenths of the land in question, and that the other four-fourteenths belonged to two minor heirs; that the plaintiff, through his agent, A. N. Hanna, purchased from the defendant and his agent, Charles S. Cross, the land in question, and that the contract of purchase and sale is embodied in the following exhibits, to wit:

EXHIBIT A.

OFFICE OF ST. LOUIS & EMPORIA RAILROAD COMPANY.
(General Offices, Emporia, Kansas.)

H. C. CROSS, *President.*

W. E. CRITZER, *Chief Engineer.*

PLEASANTON, KANSAS, 5—2, 1884.

A. N. Hanna, *Emporia, Kansas*—DEAR SIR: I have not had time to see you, and will not have time to go to look at the place; so I will say that if you will give me four hundred dollars in cash, I will give you a clear title to the land.

Respectfully, W. E. CRITZER.

EXHIBIT B.

OFFICE OF ST. LOUIS & EMPORIA RAILROAD COMPANY.
(General Offices, Emporia, Kansas.)

H. C. CROSS, *President.*

W. E. CRITZER, *Chief Engineer.*

PLEASANTON, KANSAS, 6—17, 1884.

A. N. Hanna, *Emporia, Kansas*—DEAR SIR: Yours of the thirteenth at hand, and in reply will say: I am ten-fourteenths owner of said heirs' interest, and will get heirs' interest through probate court at once; providing you make deposit of one hundred dollars to guarantee the expense of probating, subject to receiving a clear title to the land. I do my business at Emporia, with the First National Bank, who will attend to the matter for me without expense to me. I will make deed to my interest and send to First National at once, providing you accept in this way, as I do not want to put any more money in it for the heirs. I have paid for what interest I have in it at the rate of four hundred dollars for the eighty.

Let me hear from you at once, so I can answer any other parties who wish to buy.

Respectfully,

W. E. CRITZER.

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EXHIBIT C.

FIRST NATIONAL BANK OF EMPORIA, KANSAS.—Deposited for account of A. N. Hanna, 6—26, 1884, currency \$50, being deposit to apply upon purchase of north half northwest quarter 34—20—9, Chase county. If Critzer furnishes good and sufficient warranty deed in thirty days, said Hanna is to pay the remaining three hundred and fifty dollars inside thirty days from this date. If Hanna does not so pay, then this money to be forfeited to Critzer. If Critzer does not furnish said deed in thirty days, then this fifty dollars returned.—A. N. HANNA.

Dup.

CROSS.

Title to be passed upon by J. J. Buck, at Hanna's expense.

Dup.

CROSS.

EXHIBIT D.

OFFICE OF ST. LOUIS & EMPORIA RAILROAD COMPANY.
(General Offices, Emporia, Kansas.)

H. C. CROSS, *President*.W. E. CRITZER, *Chief Engineer*.

LAWRENCE, KANSAS, 7—6, 1884.

A. N. Hanna, *Emporia, Kansas*—DEAR SIR: Have just yesterday got the probate court to work on land. It appointed guardian, and will now take say until the twentieth to get everything clear and deed to you.

Hope the delay will not cause you any inconvenience, but I could not get it done sooner.

Respectfully,

W. E. CRITZER.

It is alleged in the plaintiff's petition that the Cross who signed exhibit C is Charles S. Cross, cashier of the First National Bank of Emporia, Kansas, and that he so signed the same as the agent of the defendant, Critzer, and that the fifty dollars paid to Cross, or rather deposited in the First National Bank of Emporia, Kansas, has never been returned to Hanna or to the plaintiff. It is also alleged in the plaintiff's petition that after the letter designated as "Exhibit B" was written, such proceedings were had in the probate court that the four-fourteenths' interest in the real estate in question, which belonged to the minor heirs aforesaid, was sold, and that the guardian of such minor heirs executed a deed for such interest to the defendant, Critzer; that the defendant, Critzer, has never executed any deed for the land in question to either Hanna or to the plaintiff, and refuses to do so, and

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the object of this present action is to compel him to execute such a deed to the plaintiff.

Can he be compelled to do so? The propositions contained in exhibits A and B were never accepted by the plaintiff or by Hanna, and therefore they need not be considered in the case further than as explanatory of what followed, and if any contract was entered into between the parties it must be found embodied in the transaction had between A. N. Hanna and Charles S. Cross, as shown by exhibit C. The defendant, Critzer, claims that this does not show any contract between himself and the plaintiff, Barker, and that even if it does, still that it shows only a contract of a purely optional character. The defendant claims that all the parties knew that he did not own the entire interest in the real estate in question, and that the obtaining of the four-fourteenths outstanding interest was at least problematical; and the parties knowing this, it was not intended that they should bind themselves absolutely or conclusively, but great latitude was given; and as to Critzer, the contract was made entirely optional. Critzer might never be able to get this four-fourteenths outstanding interest. The probate court, for instance, might not consider it to the interest of the minor heirs to have the same sold; and if it was sold, then Critzer would stand only an equal chance to purchase it with all others who might wish to purchase it. And further, the sale might not take place in time to enable Critzer to procure title and transfer the same to Hanna or the plaintiff within thirty days; and the contract was that if the transaction was not closed up within thirty days there should be no transfer of title. If Hanna failed to perform in thirty days, he forfeited the fifty dollars, and the contract was at an end; or if Critzer failed to perform within thirty days by failing to tender a deed within that time, then the contract was at an end without any forfeiture and the fifty dollars were to be returned to Hanna.

The contract itself contemplated that the deed might not be furnished within the thirty days, and provided that if it should not be so furnished then that the fifty dollars depos-

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ted by Hanna in the First National Bank should be returned to him. The deed was not so furnished, and evidently Hanna's remedy, or the plaintiff's remedy if the plaintiff stands in the place of Hanna, is to sue for fifty dollars and not to bring an action in the nature of specific performance to compel the conveyance of the real estate in question. Probably, however, there will be no necessity to sue for the fifty dollars, as the bank, or Cross, or the defendant, will in all probability pay it whenever the plaintiff is ready to receive it. Optional and unilateral contracts will be found discussed in chapter 6 of Waterman on the Specific Performance of Contracts; and especially see §§ 196 and 200. We think the contract in the present case was optional, at least so far as Critzer is concerned, and therefore that the plaintiff's present action cannot be maintained.

The judgment of the court below will be affirmed.

All the Justices concurring.

M. R. BARKER v. CHARLES S. CROSS, *et al.*

ACTION brought by *Barker* in the district court of Chase county, against *Cross* and another, to compel the specific performance of a certain contract. Judgment for defendants, at the April Term, 1885. The plaintiff brings the case here.

Per Curiam: The judgment of the court below in this case will be affirmed, upon the authority of the case of *Barker v. Critzer*, just decided.

THE ST. LOUIS, FT. SCOTT & WICHITA RAILROAD COMPANY V. T. L. DAVIS.

1. **PART PAYMENT; *Creditor not Estopped by Receipt.*** The payment of a portion of an ascertained, overdue, and undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance; and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt.
2. ——— ***Express Agreement.*** Before the acceptance by the creditor of an amount less than is claimed will operate as a settlement or satisfaction of the entire debt, it must have been accepted on an express agreement to that effect.
3. **RECEIPT as Evidence.** A receipt is only *prima facie* evidence of the admissions which it contains, and where it does not embody a contract it is open to explanation, and the party admitting payment in full may show it to be untrue.

Error from Greenwood District Court.

T. L. DAVIS brought this action against *The St. Louis, Fort Scott & Wichita Railroad Company*, to recover \$680 for legal services rendered by him for and at the request of the railroad company during the year 1883, in the trial of seventeen causes before justices of the peace of Greenwood county, and in the trial of fifteen causes in the district court of Greenwood county, and in the making and preparation of ten of the cases for the supreme court. The defendant filed an answer, in which it was admitted that the plaintiff had performed the legal services as itemized and charged in his petition, up to May, 1883, which included the trial of the causes in the justices' and district courts, but alleged that since the performance of the services, it had paid to the plaintiff an amount of money which the plaintiff received and accepted in full accord and satisfaction of all claims, dues and demands against the defendant up to that time. It denied that the plaintiff had performed the services charged for the making of the cases for the supreme court, and alleged the fact to be that the plaintiff had failed and neglected to make the cases for the supreme court as it

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was his duty, and as he had agreed to do; and that by reason of such refusal and neglect, the defendant was damaged in the sum of \$1,000. It was also alleged in the answer that certain services for which charges had been made by the plaintiff were rendered upon the agreement that no compensation should be asked therefor. The reply of the plaintiff was a general denial of the allegations of the answer. At the August Term, 1884, a trial was had, without a jury, and upon the testimony, much of which was conflicting, the court made the following findings of fact and conclusions of law:

"1. The defendant is, and has been for more than three years last past, a corporation duly organized under and by virtue of the laws of the state of Kansas.

"2. Plaintiff is, and for more than five years last past has been, a practicing attorney at law.

"3. Plaintiff has, as an attorney, performed all the services stated in his petition in this action for defendant, and at its special instance and request.

"4. Said services were reasonably worth the amount charged in said petition.

"5. Plaintiff has never at any time received from defendant, or any other person for it, any compensation for any of the services charged for in his petition.

"6. All the services charged for by plaintiff in this action were performed in what is known as the Whittaker cases, except the three five-dollar charges set out in said petition.

"7. Prior to the performance of the services charged for in this action, the plaintiff had been employed as such attorney by defendant to attend to and manage for defendant certain cases known as the abandoned-right-of-way cases, for which defendant agreed to pay plaintiff the sum of \$1,200.

"8. Plaintiff fully performed all the services in said abandoned-right-of-way cases as per contract therefor.

"9. At one time the defendant paid to the plaintiff the sum of \$100 on said abandoned-right-of-way contract; at another time the sum of \$500 thereon.

"10. Some time after the payment of said \$500, the plaintiff went to Fort Scott and made a demand on defendant, through its agent and superintendent, J. D. Hill, for the sum of \$600 as the balance due him on abandoned-right-of-way contract.

"11. Said Hill told plaintiff that defendant had no money, but if he (plaintiff) would take \$400, and give a clear receipt for \$600, that he (Hill) would give his (Hill's) individual check for \$400. Plaintiff finally agreed to do so, and the \$400 check given to plaintiff, and a receipt for \$600 was given by plaintiff to Hill. At the time of this transaction said Hill was the agent and superintendent of defendant. At this time plaintiff was in great need of money, which fact was made known to Hill, and plaintiff stated to Hill at the time of giving said receipt, that he did not want to be swindled out of that other \$200 which was due him, and that he did not think it right to take advantage of his necessities, whereupon Hill said: 'Well, you just sign that receipt, and the \$200 will be all right.' Plaintiff thereupon signed said receipt, with the understanding that the \$200 was still due and would be paid.

"12. Some time after the last above-mentioned transaction, and after the plaintiff had performed the services sued for in this action, and before the commencement thereof, the plaintiff again went to Fort Scott and presented to one Mr. Dowland, who was at the time the auditor of the defendant, his claim against defendant, which consisted of \$200, balance on abandoned right-of-way cases, and for services rendered in cases sued on in this action. Dowland refused to pay for any of the services rendered in the Whittaker cases, stating that Mr. Hill had told him that the services in the Whittaker cases were rendered by plaintiff for nothing, which plaintiff denied; he (Dowland) stating that he would give his check for the \$200 on abandoned right-of-way cases, if plaintiff would receipt in full for all services rendered in the Whittaker cases, which was, after considerable wrangling, agreed to by plaintiff, and said check and receipt were passed.

"13. Plaintiff at the time of receiving the check of Mr. Dowland for \$200, and executing his receipt in full for all services in the Whittaker cases, filed with said Dowland his written protest, stating in substance that he still claimed that the defendant owed him for all the services rendered in the Whittaker cases; said check was paid the next day after said protest was filed.

"14. \$1,200 is the whole amount of compensation that plaintiff has ever received for all the services rendered by him for the defendant.

"15. There is now due and owing to plaintiff from defendant the sum of \$725."

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As a conclusion of law based upon the foregoing findings, the court found that the plaintiff is entitled to judgment against defendant for the sum of \$725. Judgment was given in accordance with the findings of the district court, a reversal of which is sought here.

J. H. Richards, and *Clogston & Fuller*, for plaintiff in error.

T. L. Davis, defendant in error, for himself.

The opinion of the court was delivered by

JOHNSTON, J.: The evidence given on the trial, construed favorably to the plaintiff below, is sufficient to sustain the findings of the court, and we must therefore take the facts as they have been found. There is no dispute but that the services sued for were rendered by the plaintiff, and were worth the sums which he charged therefor. It is insisted by the railroad company that there has been an accord and satisfaction of his claim. Since the services were rendered by the plaintiff he has signed a receipt acknowledging the payment of \$200, and it recites that it is in full for all services rendered to the company, including those for which this action was brought. Davis claims that the \$200 was due and paid for other services rendered at an earlier time, in what is termed the "right-of-way cases," and also that at the time of receiving the payment and signing the receipt, he protested both verbally and in writing, that it was not a complete satisfaction, and that he still claimed compensation for the services in the "Whittaker cases," which are those involved in this action. On the other hand, it is claimed by the railroad company that Davis had, before that time, acknowledged payment in full for the services which he had rendered for the company in the right-of-way cases, and therefore that the \$200 was a payment on and in full satisfaction of his claim for services in the "Whittaker cases."

It seems that prior to his employment in the "Whittaker cases," he was employed by J. D. Hill, superintendent of the

railroad company, to attend to the "right-of-way cases," at an agreed compensation of \$1,200. The plaintiff was first paid the sum of \$100 under that contract, and at another time \$500 was paid thereon. Some time after the payment of the \$500, and when the plaintiff was in great need of money, he applied to Superintendent Hill for the balance of \$600 which was due him under that contract. The superintendent told the plaintiff that the company had no money, but if the plaintiff would give a clear receipt for the \$600, that he would give his individual check for \$400. The plaintiff stated that he did not think it right to take advantage of his necessities, and that he did not want to be swindled out of the other \$200 which was still due him; when the superintendent told him, "You just sign that receipt, and the \$200 will be all right." The plaintiff then signed the receipt, with the understanding that the \$200 was still due and would be paid.

It is claimed by the railroad company that this payment by Hill was a perfect accord and satisfaction. To this we cannot agree. It is a well-settled principle of law that the payment of a part of an ascertained, overdue, and undisputed debt, although accepted as full satisfaction, and a receipt in full is given, does not estop the creditor from recovering the balance. In such a case, the agreement to accept a smaller sum in payment of a greater is regarded to be without consideration. (*Bridge Co. v. Murphy*, 13 Kas. 35.) It has been stated by some of the courts that the rule is rigid, rather unreasonable, and to some extent against good faith, and one not to be extended beyond its precise import, and therefore that any new consideration or any collateral benefit received by the creditor, which would raise a technical legal consideration, however small, is sufficient to support the agreement. Before the payment of the \$400 to the plaintiff can operate as a satisfaction of his claim for \$600, it must not only appear that there was some new consideration for the agreement to accept a smaller sum in extinguishment of the debt, but it must also appear that the parties mutually agreed that the sum paid should be

1. Part payment; creditor not estopped by receipt in full.

Opinion of the Court.

accepted in discharge of the entire debt. It may be conceded that the payment of a smaller sum before it is due, or at a place different from that where the money was agreed to be paid, or where the note or obligation of a third person is given in payment, might be treated as of some benefit to the creditor, and if it was so agreed, it would operate as a satisfaction of the whole debt. The railroad company insists that the giving and acceptance of the individual check of the superintendent of the defendant company is sufficient to afford a technical legal consideration, and make the rule mentioned inapplicable. It appears, however, that the plaintiff was employed by Hill, the superintendent and representative of the company, and that the receipt which was prepared by Hill for the signature of the plaintiff recited that the \$400 was received from the St. Louis, Fort Scott & Wichita Railroad Company. The company can only act through its officers and agents, and although the superintendent gave his individual check, there were grounds for the conclusion that the payments were made solely for and in behalf of the company. But whether Hill acted for the company or is to be regarded as a third person in the transaction, it is clear that an essential element of accord and satisfaction is wanting. There was no agreement that the sum paid should operate as a total extinguishment of the entire indebtedness. This was the claim of the railroad company, and there was considerable evidence offered in support of it; but the finding of the court is substantially that notwithstanding the signing of the receipt for the entire sum, there was an understanding and agreement that the balance was still due and would be paid. There was then \$200 of a balance due to the plaintiff on the "right-of-way cases," and it will be observed that this is the amount of the last payment, and the amount mentioned in the final receipt, which payment and receipt the railroad company insists is a valid discharge of the plaintiff's claim for services in the "Whittaker cases." Treating this as a payment of what was due under the former contract for the "right-of-way cases," as

the court below seems to have done, nothing whatever has been paid to the plaintiff upon the claim on which he sues. The railroad company contends that the final payment and receipt should be regarded as a discharge of the entire debt; first, because the auditor of the railroad, in making the payment, gave his individual check; and second, because the payment was the result of a compromise upon a doubtful and disputed claim. Neither of these claims can be maintained, for the reason that the payment of the \$200 was not accepted by the plaintiff as a full satisfaction of his claim against the company. As we have seen, the payment of a less sum does

2. Express agree-
ment. not have the effect of satisfying a greater one unless it has been expressly accepted as such by the creditor. It is true the plaintiff signed the receipt acknowledging payment in full, but there was no contract embodied in the receipt. It is well settled in this state, that a

3. Receipt as
evidence. receipt furnishes only *prima facie* evidence of the declarations and admissions which it contains, and that a party giving a receipt admitting payment in full has a right to show that it is untrue. (*Clark v. Marbourg*, 33 Kas. 471; *Bridge Co. v. Murphy*, 13 id. 35; *Stout v. Hyatt*, 13 id. 232.) This receipt, then, was open to explanation or contradiction, and the court finds that at the time of receiving the check and signing the receipt, the plaintiff insisted that he still claimed compensation for all his services in the "Whittaker cases." It seems that in connection with the delivery of the check, and in the presence of the auditor, the plaintiff made and filed with the auditor a written protest claiming that the services for which this action was brought still remained due and unpaid. It also appears that the check, receipt and protest were executed in the evening, after banking hours, so that the check could not be and was not paid until the next day, and there was therefore ample time after the filing of the protest for the company or its auditor to stop the payment of the check; but this was not done.

Under these circumstances we must conclude that the plain-

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tiff did not agree to relinquish his claim for services in the Whittaker cases; and as the \$200 payment was not accepted as a satisfaction of that claim, it cannot have that effect.

The judgment of the district court will therefore be affirmed.

All the Justices concurring.

36	471
38	496
36	471
46	238

A. J. HENTIG v. J. W. REDDEN.

GENERAL ASSIGNMENT; Mistake; Notice; Tax Sale; Possession. One P., residing in Indiana, was the owner of certain lots in the city of Topeka, in this state. Under the laws of Indiana, he executed a deed of assignment of certain real and personal property to one B., in trust for his creditors. He intended to convey thereby all of his real and personal property, and among other real estate, the lots owned by him in Topeka, but by mistake of the scrivener who prepared the deed, other lots in the city of Topeka, to which P. had no title, were inserted, and the lots intended to be conveyed were wholly omitted therefrom. The property transferred by P. to his assignee failed to pay the debts of his creditors, only fifty cents being realized by them on the dollar. Subsequently, P. conveyed the lots in Topeka, the title to which was in his name, to R., by quitclaim deed. Prior to this conveyance the deed of assignment had never been recorded in the office of the register of deeds of Shawnee county, in this state, nor any steps taken to correct the misdescription in the deed, or subject the lots to the possession of P.'s assignee. R. had no actual notice of the deed of assignment before his purchase. *Held*, That as between R. and one H., in possession of the lots under a tax deed founded upon an invalid tax sale, that R., as the holder of the legal title to the premises, is entitled to possession thereof, subject to H.'s lien for taxes, interest, and costs, and his rights as an occupying claimant.

Error from Shawnee District Court.

ACTION in the nature of ejectment, brought October 1, 1883, by *Joseph W. Redden* against *A. J. Hentig* and others, to recover the possession of lots 408, 410, 412, and 414, on Clay street, in the city of Topeka, in this state. On November 1,

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1883, Mrs. A. J. Hentig filed an answer, setting forth, among other things, as a defense —

“That one Jacob J. Puterbaugh, who is a resident of Logansport, Cass county, Indiana, and a citizen of said state of Indiana, is the pretended grantor to the plaintiff, Joseph W. Redden, of the real property described in his petition in this action, and that long prior to the date of the pretended conveyance of said real estate to said plaintiff, Redden, by Puterbaugh, to wit, on the 1st day of March, 1878, being then insolvent, the said Jacob J. Puterbaugh duly executed and delivered to one Thomas H. Brinkhurst—as assignee under the laws of the state of Indiana, for the benefit of creditors—a deed of assignment in writing of that date, and thereby conveyed all his real estate and personal property of every kind and nature to said Thomas H. Brinkhurst, who duly accepted said trust, and thereby became the owner of said real estate mentioned; to all of which proceedings and deed of assignment the said plaintiff had full knowledge before his said pretended purchase.”

She also alleged in her answer that she was the owner and in the possession of the real estate in controversy, by virtue of a tax deed executed to her and filed by her for record, on September 30, 1882. She also set forth that she had made lasting and valuable improvements, of the amount of \$2,000. Subsequently the plaintiff filed a reply, alleging, among other things, that the tax deed failed to invest the defendant, A. J. Hentig, with any title, because it was issued upon a voidable sale. The defendant, F. G. Hentig, also filed a separate answer, containing a general denial. First trial on October 1, 1884, and judgment was entered in favor of the defendant. This judgment was vacated, and a new trial granted as provided for by § 599 of the code. The second trial was had on February 18, 1885, before the court, a jury being waived. The presiding judge, Hon. John Guthrie, having been interested in the case, by agreement of the parties Hon. John Martin was selected as judge *pro tem.* to try the cause. No special findings of fact were requested by either party, but the court made the following findings:

“1. At the commencement of this action, the plaintiff, J. W. Redden, was the owner in fee simple of lots 408, 410, 412

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and 414, on Clay street, in the city of Topeka, Kansas, and is such owner now, and that all the material allegations in his petition are true.

"2. A. J. Hentig is in the possession, under two tax deeds, one recorded May 9, 1877, and the other recorded September 30, 1882, both issued on the tax sale of 1874 for the taxes of 1873.

"3. Such tax sale is void, because there was an unlawful combination of bidders at the sale, which prevented competition, and the sale was made for illegal taxes and illegal costs charged against the lots.

"4. The taxes paid by the Hentigs on lots 408, 410, 412, 414, 416, 418, which adjoin and are one tract, and which were assessed and sold as one piece of land, including penalties, costs, and interest at 50 per cent. from the payments up to the 9th of May, 1877, when the first tax deed was executed, and then 20 per cent. on that sum and on all subsequent taxes, with the subsequent taxes, amounting to \$258, up to the day of trial, February 18, 1885, and counting the same sums at 50 per cent. on said taxes on said six lots up to the 30th of September, 1882, when the second tax deed was executed, and then 20 per cent. on that amount, and the subsequent taxes—the total sum with said amounts of interest is \$401.67; and on the four lots in controversy, being two-thirds of the said six lots, the taxes are \$267.78, and are a lien on said four lots, viz.: Nos. 408, 410, 412, and 414, on Clay street, in the city of Topeka."

Judgment was entered that the defendants surrender the possession of the lots in controversy to the plaintiff, subject to the payment to Mrs. A. J. Hentig of the taxes, interest and costs, amounting to \$267.78, and also subject to Mrs. A. J. Hentig's rights as an occupying claimant. Costs were adjudged against the defendants. To the rulings and judgment of the court *Mrs. A. J. Hentig* excepted, and brings the case here.

F. G. Hentig, for plaintiff in error.

H. H. Harris, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action brought by Joseph W. Redden against Mrs. A. J. Hentig and others, in the nature of

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ejectment, for the recovery of lots 408, 410, 412, and 414, on Clay street, in the city of Topeka. Upon the final trial, the case was submitted to the court below, without a jury, and the court rendered judgment in favor of the plaintiff and against the defendants, preserving however to the defendant, Mrs. A. J. Hentig, the taxes paid by her upon the lots, with interest and costs, and her rights as an occupying claimant.

The first question is, whether the judgment rendered in favor of the plaintiff below is correct. It appears from the record that on August 20, 1869, the title to the lots in controversy was in T. P. Rodgers and A. K. Rodgers. On October 7, 1870, T. P. and A. K. Rodgers conveyed, by warranty deed, the lots to Jacob J. Puterbaugh, of the city of Logansport, state of Indiana. On August 22, 1883, Jacob J. Puterbaugh and wife conveyed by quitclaim deed the lots to Joseph W. Redden, the consideration for the conveyance, recited in the deed, being \$120, although Redden testified upon the trial that he paid \$225. After the lots had been conveyed to Puterbaugh by the Rodgerses, and prior to the conveyance to Redden by Puterbaugh, and on March 1, 1878, Puterbaugh executed, under the laws of Indiana, a deed of assignment of certain real and personal property to James H. Brinkhurst, in trust for the benefit of creditors. Puterbaugh intended in such assignment to convey all of his real and personal property, and among other real estate, the lots in dispute, but by mistake of the scrivener other lots in the city of Topeka, to which Puterbaugh had no title, were inserted in the deed of assignment, and lots 408, 410, 412, and 414, on Clay street, were therefore wholly omitted. The property transferred by Puterbaugh to his assignee, Brinkhurst, failed to pay the debts of the creditors, only fifty cents on the dollar being realized by them for such purpose. Prior to the conveyance by Puterbaugh and wife to Redden, the deed of assignment had never been recorded in the office of the register of deeds of Shawnee county, nor any steps taken to correct the misdescription in the deed, or to subject the lots conveyed to Redden to the possession of Brinkhurst, the assignee of Puterbaugh.

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Under the findings of the court, we must also assume that Redden had no notice of the deed of assignment before his purchase. The evidence on this point is conflicting, but upon the findings and judgment, it is clear that the court decided that Redden acted without notice. As Mrs. A. J. Hentig, in possession of the property, claimed under a tax deed, adverse to Puterbaugh, and also to Brinkhurst, his assignee, her possession would not put Redden upon notice of the deed of assignment. There was sufficient evidence presented to the trial court to sustain the finding that the tax sale of 1874, upon which the tax deed was issued, was invalid, and therefore, if Redden was entitled to recover upon his title, Mrs. Hentig can only be protected to the amount of taxes and charges paid by her, with interest thereon, and as an occupying claimant.

On the part of Mrs. Hentig it is insisted that Redden cannot be regarded as a purchaser in good faith, for the reason that he holds under a quitclaim deed. Therefore it is insisted that he is charged with notice of all the equities of Brinkhurst, the assignee of Puterbaugh. On the part of Redden it is urged that a quitclaim deed is as effectual to convey title as one with general warranty, and that there is no distinction between a quitclaim and a warranty deed, as affecting the holder with notice, or putting him on inquiry. The authorities are conflicting, whether a quitclaim deed gives one who claims under it the rights of a *bona fide* purchaser without notice. That it does, see Martindale on the Law of Conveyancing, §§ 59, 285; *Graff v. Middleton*, 43 Cal. 341; *McConnell v. Read*, 4 Scam. (Ill.) 117; *Fash v. Blake*, 38 Ill. 363; *Bradbury v. Davis*, 5 Col. 265; *Chapman v. Sims*, 53 Miss. 154. That it does not, see *Baker v. Woodard*, 6 Pac. Rep. 173; *Gress v. Evans*, 1 Dak. 387; *Hoyt v. Schuyler*, 28 N. W. Rep. 306; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Marshall v. Roberts*, 18 Minn. 405; *May v. Laclaire*, 11 Wall. 217; *Rodgers v. Burchard*, 34 Tex. 441; *Springer v. Bartell*, 46 Iowa, 688; *Stoffel v. Schroeder*, 62 Mo. 147; *Battershall v. Stevens*, 34 Mich. 68;

Assignment; mis-
take; notice;
tax sale;
possession.

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Nash v. Bean, 74 Me. 340; *Richards v. Snyder*, 6 Pac. Rep. 186.

This question, so forcibly discussed in the briefs, need not, however, be decided; and therefore we purposely refrain from expressing our opinion at this time thereon.

All of the authorities agree that a purchaser under a quitclaim deed takes such interest or title in the premises conveyed as the grantor may lawfully convey, and therefore acquires by such a deed all the rights that the grantor had in the premises at the time of the conveyance. On August 22, 1883, when Puterbaugh and wife executed their conveyance to Redden, Puterbaugh had the legal title to the premises conveyed. This title, at least, Puterbaugh transferred and conveyed to his grantee, Redden. As the holder of the legal title, Redden had a better right to the possession of the premises than Mrs. A. J. Hentig, claiming under a tax deed not barred by the statute of limitations, and founded upon an invalid tax sale. Mrs. Hentig does not represent Brinkhurst, the assignee of Puterbaugh, nor the creditors of Puterbaugh. Her interest, if any, is wholly adverse to all of these parties. On the other hand, if neither Brinkhurst, the assignee of Puterbaugh, nor the creditors of Puterbaugh, choose to disturb Redden in his title, the latter's title is conclusive against the world.

Again, the action of Redden, if it be conceded that he cannot be called a *bona fide* purchaser under his quitclaim deed, is not adverse to the interests of Brinkhurst, the assignee of Puterbaugh, or the creditors of Puterbaugh. If they are the equitable owners of the property—which we do not decide—their interests are much better protected by the possession of the premises being given to Redden, as the holder of the legal title, than to Mrs. Hentig, under a tax deed which might, perchance, by possession, ripen into a perfect title. The question whether a purchaser who takes by a quitclaim deed is affected by prior equities, might become material in an action between Brinkhurst, the assignee of Puterbaugh, and Redden, but does not arise in this case, between Mrs. Hentig and Redden. Here, notice of prior equities is wholly unimportant.

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If Puterbaugh had never executed the conveyance to Redden, he would be entitled to recover, as against Mrs. Hentig, possession of the lots, subject, of course, to her lien for taxes, etc., if neither his assignee, nor his creditors, intervened or objected. Such a proceeding would assist in protecting the estate assigned for the benefit of the creditors; would also strengthen the equities of Brinkhurst, the assignee; and would not prejudice the rights of any creditor.

Redden has filed a cross-petition, asking the judgment to be so modified as to reduce the amount of taxes, interest and costs to \$100. The record purports to contain all of the testimony produced upon the trial. The only evidence in the record of the payment of taxes is embraced in two tax deeds. One tax deed is dated May 9, 1877, and the other tax deed is dated September 30, 1882. According to our computation, allowing interest at fifty per cent. to the date of the first tax deed, the evidence shows only \$86.51 as a lien for taxes, charges, etc. If, however, Mrs. Hentig is allowed fifty per cent. to the date of the tax deed of September 30, 1882, according to our computation only \$109.48 is to be repaid for taxes, etc. If Mrs. Hentig claims as an occupying claimant, or otherwise, under the first tax deed recorded by her, she can only claim interest at fifty per cent. upon the taxes paid by her to the date of that deed, and twenty per cent. thereafter. If, however, she has waived all rights which might otherwise be claimed under the first tax deed, she will be entitled to the full amount of all taxes paid on such lands, with interest at fifty per cent. and costs as allowed by law up to the date of the second tax deed, including the costs of such deed and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum, after the date of said deed, together with all subsequent taxes paid by her, and interest thereon at the rate of twenty per cent. per annum. (Comp. Laws of 1879, ch. 107, § 142.)

As the evidence does not support the amount of the lien for taxes, charges, etc., which Redden was adjudged to pay to Mrs. Hentig, that finding must be set aside.

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The judgment rendered in favor of Redden and against the Hentigs, that they surrender the possession of the lots described in the petition, will be affirmed; but the case will be remanded to the district court for further hearing as to the amount of taxes, charges, etc., which Redden must pay before he shall be let into possession.

All the Justices concurring.

35	478
46	704
35	478
52	560

JOSEPH L. CRAWFORD V. DAVID P. SHAFT.

Tax Laws; Minor Owner; Redemption; Saving Clause. Where certain land was sold for taxes under the tax law of 1868, (Gen. Stat. 1868, ch. 107,) the original owner, who was a minor, had the right to redeem his land from the taxes under such tax law, although before the time given him by such law had expired, and before he attempted to redeem his land from the taxes, the tax law of 1876 (Laws of 1876, ch. 84; Comp. Laws 1879, ch. 107) was enacted. The saving clause contained in § 155 of the tax law of 1876 is broad enough in its terms to give him such right to redeem under the tax law of 1868.

Error from Chase District Court.

EJECTMENT, brought by *Crawford* against *Shaft*, to recover certain land situate in Chase county. Trial by the court, at the April Term, 1885, and judgment for the defendant. The plaintiff brings the case here. The opinion states the facts.

Almerin Gillett, for plaintiff in error.

C. N. Sterry, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought in the district court of Chase county by Joseph L. Crawford against David P. Shaft, to recover a certain piece of land situated in that county. The case was tried be-

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fore the court without a jury, and the court found generally in favor of the defendant and against the plaintiff, and rendered judgment accordingly. The plaintiff brings the case to this court for review.

It appears from the undisputed evidence introduced on the trial, that the plaintiff holds the original patent title, and that the defendant claims title under a tax deed issued by the county clerk of Chase county on July 12, 1875, recorded July 30, 1875, based upon a tax sale made June 24, 1872, for the taxes due on the land for the year 1871. At the time the land was sold it belonged to a minor, Seymour L. Byington, who did not become of age until March 29, 1883; hence under the statutes in force during that time and still in force, he had a right to redeem the land up to March 29, 1884. (Gen. Stat. of 1868, ch. 107, §101; Comp. Laws of 1879, ch. 107, §128.) On December 20, 1883, he attempted to redeem the land from the taxes, and paid an amount to the county treasurer sufficient to redeem the same from the taxes, if the tax law of 1868 was to govern, (Gen. Stat. of 1868, ch. 107, §§101, 105;) but not enough if the tax law of 1876 was to govern. (Comp. Laws of 1879, ch. 107, §§127, 128, 132.) The county treasurer accepted the money, and issued a certificate of redemption to the owner, which certificate was duly countersigned by the county clerk. Upon these facts, the court below held that the redemption was not sufficient; that it should have been had under the laws of 1876, and not under the laws of 1868, and therefore that the attempted redemption was a nullity, that the certificate of redemption is void, that the tax deed is good, and that the holder of the tax deed holds the superior and paramount title. The plaintiff in error, however, claims that this holding of the district court is erroneous. He claims that the tax laws of 1868 govern in this case, and not the aforesaid §132 of the tax laws of 1876, and therefore that the redemption was good, and therefore that he holds the better and paramount title; and he claims this, first, because of a certain saving clause contained in the tax law of 1876, (Comp. Laws of 1879, ch. 107, §155;) second, because of a certain

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saving clause contained in the act of 1868 relating to the construction of statutes, (Comp. Laws 1879, ch. 104, § 1, subdiv. 1;) third, because, as he claims, the owner of the property had a vested right under the tax laws of 1868, not merely a privilege, to redeem his property from any taxes which might be levied against the same from the year 1871 up to the date of redemption, or until March 29, 1884, which vested right the legislature could not take away from him by any change of the law, or by a repeal of the same or otherwise; fourth, because the attempted redemption was a *bona fide* attempt, and as his money was received by the county treasurer and a formal certificate of redemption was duly issued to him and duly countersigned, his attempted redemption was good, whether he paid a sufficient amount therefor or not, and whether the laws of 1868 or the laws of 1876 are to govern; and if he did not in fact pay a sufficient amount of money to redeem, still the attempted redemption is good, leaving the tax-deed holder to recover the remainder of the taxes in an action of ejectment under § 142 of the present tax laws, § 117 of the laws of 1868, or in an action brought specifically for that purpose, which unpaid taxes are still a lien upon the land.

The saving clauses above mentioned read as follows:

"SEC. 155. All matters relative to the sale and conveyance of lands for taxes under any prior statute, shall be fully completed according to the laws under which they originated, the same as if such laws remained in force." (Laws of 1876, ch. 34, § 155; Comp. Laws of 1879, ch. 107, § 155.)

"SEC. 1. In the construction of the statutes of this state, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: First, the repeal of the statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." (Gen. Stat. of 1868, ch. 104, § 1; Comp. Laws of 1879, ch. 104, § 1.)

Opinion of the Court.

We are inclined to think that § 155 of the tax laws of 1876 is broad enough to apply to this case. The defendant claims, however, that it can be applied only to the mere sale and mere conveyance of lands sold for taxes and to nothing else; but such is not the language of the statute. The language of the statute makes it apply to "*all matters* relative to the sale and conveyance of lands for taxes;" and these "*matters*" are to "be fully completed according to the laws under which they originated, the same as if such laws remained in force." A conveyance of lands sold for taxes is never in form a conveyance absolute, but is always in form only a conveyance upon condition. It is a conveyance "subject, however, to all rights of redemption provided by law." (Gen. Stat. 1868, ch. 107, § 112; Comp. Laws 1879, ch. 107, § 138.) And the tax deed in the present case conveyed the property to the defendant's grantor, W. R. Beebe, expressly and in terms, "subject, however, to all rights of redemption provided by law." It will therefore be seen that under the statutes and as a matter of fact the conveyance by the tax deed under which the defendant now claims, was a conveyance only upon condition and not a conveyance absolute; and this conveyance would become absolute only upon the condition that the original owner did not redeem the land from the taxes within the period of time given him by law for redeeming the same, and only when such period of time had expired, which period of time, in the present case, was that period of time elapsing from the date of the tax sale, which was June 24, 1872, up to the time when the plaintiff's grantor, Seymour L. Byington, became twenty-two years of age, which was on March 29, 1884. Of course the title to the property passed to the tax-deed holder when the tax deed was executed; but it passed to him only upon a condition subsequent—a condition that it might be defeated as to him and be restored to and reinvested in the original owner. Now, as the conveyance of the property by the tax deed could not become absolute until March 29, 1884, because of the original owner's continuing right up to that time to redeem the land from the taxes and his right

Tax laws; minor
owner; re-
demption;
saving clause.

Crawford v. Shaft.

thereby to defeat and destroy the conveyance, such right of redemption was necessarily one of the "*matters* relative to the . . . conveyance," which the legislature had in contemplation when it enacted said § 155 of the tax law of 1876, and being one of such "*matters*," such right to redeem under the tax law of 1868 is saved by said section.

The case of *Briscoe v. Comm'rs of Ellsworth Co.*, 23 Kas. 334, has no application to this case. That case was decided under chapter 43 of the Laws of 1879, (Comp. Laws 1879, ch. 107, ¶¶ 5911 to 5914,) which chapter contains no saving clause, and it is clear from the contents of that chapter, that it was "the manifest intent of the legislature" enacting it, that the prior statute should be changed and modified, and that the law, as the legislature then enacted it, should be just what that chapter shows it to be. Besides, in that case it was a county that claimed vested rights under the prior statute, and not an individual person, as in this case; and all the authorities hold that the legislature has more power over the affairs of counties in regulating and determining rights, than it has over the affairs of individual persons.

If the view that we have taken of § 155 of the tax law of 1876 is the correct view, and we think it is, it will not be necessary for us to further consider any of the other questions presented in the case, and therefore we shall not further consider them.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

F. E. HENDRICKS v. THE BOARD OF COMMISSIONERS
OF CHAUTAUQUA COUNTY.

1. **SHERIFF—Boarding Prisoners.** The duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff, and to him alone is the county liable for the same.
2. **MEDICAL SERVICES for Prisoners; Liability of County.** Under § 381 of the criminal code the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board.

Error from Chautauqua District Court.

ACTION brought by *Hendricks* against *The County Board of Chautauqua County*, to recover for medical services, etc. The defendant demurred to plaintiff's petition on the ground that it does not state facts sufficient to constitute a cause of action, which demurrer the court sustained at the March Term, 1885, and rendered judgment for costs against plaintiff. He brings the case here. The opinion states the facts.

McBrian & Pile, for plaintiff in error.

Peckham & Henderson, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: F. E. Hendricks brought this action against the board of county commissioners of Chautauqua county, and in his petition alleged substantially that on November 25, 1883, the sheriff of Chautauqua county and his deputies arrested one Cyrenius B. Hendricks, and that while they had him in custody at a point fifteen miles from Sedan, where the county jail was located, he was shot, and so severely wounded that he could not be removed or taken to the county jail, and

Hendricks v. Comm'rs of Chautauqua Co.

that his condition resulting from the wound was such that it was impossible for him to receive the treatment and attention in the county jail actually necessary to his recovery; that thereupon the sheriff and his deputies, with the knowledge and consent of the defendants, removed the wounded prisoner, who was then expected to live only a short time, to the residence of the plaintiff, which was about one-fourth of a mile from the place where the prisoner was shot, and that the sheriff then requested the plaintiff to give the prisoner such treatment, nursing and medicines as his condition required. It was alleged that the plaintiff, at the instance and request of the sheriff, took charge of and attended upon and nursed the prisoner from the 25th day of November, 1883, till the 25th day of February, 1884, during which time he furnished and provided fuel for the benefit of the prisoner and beyond what was necessary for the personal use of the plaintiff, of the value of \$12, and that he expended for medicines and remedies for the prisoner the sum of \$118.65, which it is alleged were necessary, and were prescribed by the attending physician; and that he attended and waited upon the prisoner for the period of ninety days, and that his services were necessary and reasonably worth \$3 per day, and of the aggregate value of \$270, after which time the sheriff again took charge of the prisoner and conveyed him to the county jail. He alleges that the articles furnished, money expended, and services rendered, were necessary for the recovery of the prisoner, and were furnished, expended and rendered at the request of the sheriff, and with the knowledge, consent and approval of the defendants; that in 1884 Cyrenius B. Hendricks was convicted of murder in the first degree, and sentenced to suffer death, and that he is now in the penitentiary awaiting the execution of that sentence; that Cyrenius B. Hendricks has no estate, property or means of any kind to pay the plaintiff's claim, and that he will lose the same unless it is paid by Chautauqua county; that on the 5th day of January, 1885, the plaintiff duly presented his claim to the county commissioners for allowance, which was rejected, and he avers that it is now due

Opinion of the Court.

and unpaid. The defendant board demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action against it. The demurrer was sustained by the court, and the plaintiff is prosecuting this petition in error to reverse that ruling.

The facts stated in the petition fail to show a liability of the county of Chautauqua in favor of the plaintiff. The statute provides that jails shall be established and kept in every county, at the expense of the county, for the safe-keeping of the prisoners lawfully committed. The sheriff of the county is required to keep the jail, and is responsible for the manner in which it is kept, and he is required to supply the prisoners with proper food and drink at the expense of the county. (Comp. Laws of 1879, ch. 53, §§ 1, 3, 10.) In another chapter the liability of the county for the boarding and lodging of prisoners is fixed and limited. The sheriff is allowed forty cents per day exclusive of fuel, lights, furniture and bedding, where a jail is provided, and sixty cents per day where no jail is provided. (Laws of 1881, ch. 107, § 1.) The county commissioners are not compelled to allow or pay more than the fees above named for everything included within the terms "boarding and lodging," nor is the county liable to any other officer or person for the same than the sheriff. The duty and responsibility of keeping the jail and supplying and caring for the prisoners, is devolved by law upon the sheriff. The

care and safe-keeping of the prisoners are committed to him, and in regard to their board and lodging the board of county commissioners deals only with him. The only statute authorizing the payment of compensation by the county board provides that it shall be paid to the sheriff, and to him alone is the county liable for supplying board and lodging for the prisoners. (*Comm'rs of Atchison Co. v. Tomlinson*, 9 Kas. 167.)

It appears that the prisoner was held and cared for by the plaintiff at the request of the sheriff, outside of the jail, although there was a jail at the county seat. Where the jail is over-crowded or insufficient, or where for some other good

1. Sheriff; boarding and lodging prisoners.

Hendricks v. Comm'rs of Chautauqua Co.

reason the prisoner cannot be properly kept and supplied in the jail, as was the case here, he may be temporarily held and supplied outside of the jail. In such a case the county would doubtless be liable for the statutory compensation. Where the jail is insufficient for the safe-keeping of prisoners, the sheriff may employ such guards as are actually necessary, and for the service of such guards "the board of county commissioners shall *allow the sheriff* reasonable compensation, to be paid out of the county treasury." (Laws of 1881, ch. 107, § 1.) The liability of the county for the services of these guards, or for the temporary restraint and maintenance of the prisoners outside of the jail, is to the sheriff, and therefore while the sheriff has a right to claim compensation for holding and supplying the prisoners outside of the jail, the plaintiff has not.

The items of the plaintiff's account, and for which he sues, do not fall within the service and supplies of which mention has been made, and which are to be furnished by the sheriff as board and lodging. There is another section, however, which does include them. It reads as follows:

"Whenever the tribunal transacting county business of any county in which the offender shall have committed any crime for which he is imprisoned, may be satisfied of the necessity of so doing, they may make an allowance for ironing the prisoner, and may allow a moderate compensation for medical services, fuel, bedding and menial attendance for any prisoner, which shall be paid out of the county treasury." (Crim. Code, § 331.)

Under this authority, the tribunal transacting county business may make an allowance for medical services, fuel, bedding, and menial attendance furnished for prisoners to any person who furnishes the same, and is not confined to dealing with the sheriff alone. The authorization of or allowance for such services is, however, discretionary with the board. The board "*may* allow a moderate compensation" when it is "*satisfied* of the necessity of so doing." The county cannot be held liable because the service and supplies were furnished

2. Medical services for prisoner; liability of county.

Opinion of the Court.

upon the request of the sheriff; nor by reason of the individual consent or action of the members of the county board. (*Roberts v. Comm'rs of Pottawatomie Co.*, 10 Kas. 29.) The liability of the county can only arise upon an order made by the county commissioners duly convened and acting as a board. The petition alleges, it is true, that the prisoner was placed by the sheriff in charge of the plaintiff, with the knowledge and consent of the county commissioners, and that the supplies were furnished and the services rendered by the plaintiff at the request of the sheriff, and with the knowledge, consent and approval of the county commissioners. This is insufficient to bind the county. It is nowhere alleged that the county board consented that the plaintiff should be employed or should furnish the supplies at the expense of the county. Physicians and nurses might have been employed and medicines furnished at the instance of the sheriff, the compensation to be paid by the prisoner or by his friends, and the consent of the commissioners to such action would of course create no liability against the county. According to the petition, the only formal presentation of the matter to the county board was when the claim was presented in January, 1885, at which time the board, as it had the option and right to do, refused to make the allowance and rejected the claim. It is clear that the petition as it now stands does not state a cause of action in favor of the plaintiff and against the county, and the ruling of the court in sustaining the demurrer must therefore be affirmed.

All the Justices concurring.

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35	488
37	811
35	488
49	350
35	488
51	715
35	488
66	510

THE STATE SAVINGS ASSOCIATION OF ST. LOUIS, MISSOURI, v. W. H. BARBER.

PROMISSORY NOTE; Indorsement, Denied Under Oath; Practice. In an action brought to recover upon a promissory note payable to order, by a party claiming to be the indorsee, the answer admitted the execution of the note, but denied the written indorsement thereon, by affidavit duly verified; it admitted, however, that the note had been transferred to the plaintiff, and the defense was that the transfer was made after maturity, and that there had been a total failure of consideration for the note. *Held*, The plaintiff is entitled to judgment as being the holder and in possession of the note, unless the defense of the failure of consideration is established; but *held further*, the plaintiff is not protected as a *bona fide* holder of the note so as to cut off the equities of the maker, in the absence of proof of the execution of the written indorsement denied under oath.

Error from Phillips District Court.

ON November 2, 1883, *The State Savings Association of St. Louis, Mo.*, filed its petition against *W. H. Barber*, in words and figures as follows, (omitting court and title:)

"1. Now comes the plaintiff, and for cause of action states that the plaintiff, the State Savings Association of St. Louis, Mo., is a corporation existing under the laws of the state of Missouri, and doing business at St. Louis, Mo.

"2. Plaintiff states that on June 30th, 1883, *W. H. Barber*, the defendant, executed and delivered to *J. E. Hayner & Co.* his promissory note in writing in the sum of seventy dollars, bearing 7 per cent. interest until due, and 12 per cent. after maturity on the amount then due until paid. Said note was due October 1, 1883. Plaintiff alleges that after said note was executed and delivered to *J. E. Hayner & Co.*, and before the same became due, *J. E. Hayner & Co.* sold the same to this plaintiff, and the same was duly indorsed by *J. E. Hayner & Co.* Copy of said note is hereto attached, marked 'A,' and made a part of this petition.

"Plaintiff further avers that at the time said note became due, this plaintiff presented the same for payment to defendant, and the defendant failed to pay the same, and said note was then duly protested according to law. Copy of said protest is hereto attached, marked 'B,' and made a part of this petition.

Statement of the Case.

"Plaintiff states that the protest fees incurred amounted to 85 cents. Plaintiff states that no part of said note, interest or protest fees has been paid. Wherefore, plaintiff prays judgment for the sum of seventy-two and $\frac{11}{16}$ dollars, with interest thereon at the rate of 12 per cent. per annum from November 1, 1883, together with costs of suit."

EXHIBIT A.

"\$70.

KIRWIN, KANSAS, June 30, 1888.

"On or before the first day of October, 1888, I, of the township of Valley, county of Phillips, state of Kansas, for value received, promise to pay to the order of J. E. Hayner & Co. seventy dollars, with interest at 7 per cent., and if not paid at maturity, with interest at 12 per cent. on the amount then due until paid. Payable at Kirwin Bank.

W. H. BARBER.

"P. O. Kirwin, Kansas, Phillips county. Taken by J. A. Shattuck, agent. No. 30,626."

On the reverse side of above note appears as follows:

"For value received, I hereby guarantee the payment of the within note. Demand for payment, protest and notice of protest waived.

W. H. BARBER.

"For the purpose of obtaining the within credit, I hereby certify that I own 160 acres of land in my own name, in section 2, township 5, range 16, in the county of Phillips and state of Kansas, which is worth, at fair valuation, \$1,600; all incumbrances do not exceed —, and the title is perfect in me in all respects. I have stock and personal property to the amount of \$600, and my debts and liabilities do not exceed —. There is no judgment against me.

W. H. BARBER.

"J. E. Hayner & Co., (dated September 1, 1888:) Pay Kirwin Bank or order, for collection, account of State Savings Association of St. Louis, Mo.

J. H. McCauley, Cashier.

(Exhibit B of protest omitted.)

On January 14, 1884, the defendant filed the following answer, (omitting court and title:)

"1. The defendant admits that he executed the note set forth in plaintiff's petition.

"2. Defendant denies each and every other allegation set forth in plaintiff's petition.

"3. For a further defense to said cause of action, the defendant alleges that the moving consideration which induced defendant to execute the note sued on by plaintiff, was one self-binding harvester, which was warranted to do good and complete work; that the defendant gave the said self-binding harvester fair trial, and on its failing to do the work it was warranted to do, the defendant returned the said harvester to J. E. Hayner & Co., and demanded of them his note he had executed for said harvester. Wherefore, defendant demands judgment for costs."

Savings Association v. Barber.

On January 14, 1884, the plaintiff filed a demurrer to the answer of defendant, alleging therein that the same did not constitute any defense to plaintiff's cause of action, as set forth in the petition. At the March Term of court for 1884, the demurrer was sustained, and defendant was allowed until May 30, 1884, to file his answer; and plaintiff was allowed until July 3, 1884, to plead thereto. Subsequently, the defendant filed the following amended answer:

"Now comes the said defendant, W. H. Barber, and for his amended and supplemental answer to the petition of plaintiff filed herein says:

"1. He admits the execution of the note set up in plaintiff's petition; and also that the plaintiff is a corporation; but denies each and every other allegation, statement and averment therein contained.

"2. For further answer this defendant says, that the note sued on by plaintiff in this action is not by its terms and conditions a negotiable instrument by the law-merchant.

"3. The plaintiff has no corporate right to become purchaser and owner of said note.

"4. Said plaintiff did not purchase said note in good faith and for a valuable consideration.

"5. The said note was transferred to plaintiff without consideration, and for the purpose of cheating, wronging and defrauding the defendant.

"6. The said note was transferred to plaintiff after maturity of the same.

"7. And for further answer this defendant says, that the consideration for said note was a Walter A. Wood binder and harvester combined, and that he purchased the same from James Shattuck, who was then and there acting as the duly-authorized agent of J. E. Hayner & Co., the parties to whom defendant executed said note, and whose property the said machine was at the time the same was purchased by the defendant; and that the said J. E. Hayner & Co., through their said agent, represented to this defendant that the said harvester and binder would do good work, and was suitable for the purpose for which it was sold, and then and there warranted the same to be perfect in its construction, and that the same was in all respects a first-class machine; and the defendant, relying upon the representation of said J. E. Hayner & Co., purchased said machine and executed therefor his several promissory notes, one of which the said note hereinbefore mentioned is one.

Opinion of the Court.

"And this defendant further says that said machine was not what it was warranted and represented to be, but that it was worthless and wholly unfit for the purposes for which it was to be used; that the same was not properly constructed; that the various parts of the machine were not properly adjusted, and the same would not work, and could not be worked, so it was a total loss to this defendant; that the defendant notified the said J. E. Hayner & Co. of the failure of said machine to do the work as warranted and represented, and that after a fair and honest trial of said machine this defendant returned the said machine to said J. E. Hayner & Co. and demanded of them his notes which he had executed to said J. E. Hayner & Co. for said machine. Wherefore, this defendant prays judgment against the said plaintiff for costs of suit."

"STATE OF KANSAS, PHILLIPS COUNTY, ss.—W. H. Barber, the above-named defendant, being duly sworn, says as follows: I have read the foregoing answer and know its contents, and that the same is true, as affiant verily believes.

W. H. BARBER.

"Sworn and subscribed to before me, this 14th day of May, 1884.

GEO. B. CHAPIN,
Notary Public."

[Seal.]

To this answer the plaintiff filed a reply, containing a general denial. Trial September 25, 1884, before the court, with a jury. The jury returned a verdict for the defendant, and judgment was entered thereon against the plaintiff and in favor of the defendant for his costs, taxed at \$38.77. The plaintiff excepted to the rulings and judgment of the court, and brings the case here.

Webb McNall, for plaintiff in error.

May & McBride, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: Action by the State Savings Association of St. Louis, Mo., against W. H. Barber, upon the following promissory note:

"\$70. KIRWIN, KANSAS, June 30, 1883.

"On or before the first day of October, 1883, I, of the township of Valley, county of Phillips, state of Kansas, for

Savings Association v. Barber.

value received, promise to pay to the order J. E. Hayner & Co., seventy dollars, with interest at 7 per cent., and if not paid at maturity, with interest at 12 per cent. on the amount then due until paid. Payable at Kirwin Bank.

W. H. BARBER."

On the reverse side of above note appears as follows:

"For value received, I hereby guarantee the payment of the within note. Demand for payment, protest and notice of protest waived.

W. H. BARBER.

"For the purpose of obtaining the within credit, I hereby certify that I own 160 acres of land in my own name, in section 2, township 5, range 16, in the county of Phillips and state of Kansas, which is worth, at fair valuation, \$1,600; all incumbrances do not exceed —, and the title is perfect in me in all respects. I have stock and personal property to the amount of \$600, and my debts and liabilities do not exceed —. There is no judgment against me.

W. H. BARBER."

On the back of the note there was also the following written indorsement:

"J. E. Hayner & Co., (dated September 1, 1883:) Pay Kirwin Bank or order, for collection, account of State Savings Association of St. Louis, Mo.

J. H. McCAULEY, *Cashier.*"

The defendant filed an amended answer, verified by his affidavit, admitting the execution of the note; that the plaintiff is a corporation; but denied every other allegation, statement and averment contained in the answer. The defendant also alleged in his answer as follows:

"4. Said plaintiff did not purchase said note in good faith and for a valuable consideration.

"5. The said note was transferred to plaintiff without consideration, and for the purpose of cheating, wronging and defrauding the defendant.

"6. The said note was transferred to plaintiff after maturity of the same."

The defendant also set forth as a defense to the note, that the same was executed for a binding and harvesting machine sold to the maker by J. E. Hayner & Co.; that the machine was warranted to be a good machine and perfect in its construction,

Opinion of the Court.

but was worthless and wholly unfit for the use for which it was intended; that after a fair trial, it was returned to J. E. Hayner & Co., and therefore there was a failure of any consideration for the note.

The action was tried before the court, with a jury, and the plaintiff offered in evidence the original note, and then offered in evidence the indorsement on the back of the note for the purpose of proving that the note was duly indorsed by J. E. Hayner & Co. to the plaintiff. To the introduction of the indorsement, the defendant objected, which objection was sustained by the court. To this, exception was taken. Without further evidence, the plaintiff rested his case. The defendant introduced no evidence. At the instance of the defendant, the court instructed the jury upon the pleadings and evidence to return a verdict for the defendant. The plaintiff requested the court to instruct the jury to return a verdict in its behalf. This instruction was refused. Upon the instruction of the court, the jury found the issue in favor of the defendant, and judgment was entered thereon.

In the ruling of the court in refusing to permit the indorsement upon the back of the note to go to the jury, we perceive no error. The plaintiff alleged in his petition that after the note had been executed to J. E. Hayner & Co., and before the same became due, that J. E. Hayner & Co. sold the same to the plaintiff, and that the same was duly indorsed by J. E. Hayner & Co. The alleged indorsement is in words as follows: "J. E. Hayner & Co. Dated Sept. 1, 1883."

The allegation of the execution of the indorsement on the note was denied by the answer, and this denial was verified by the affidavit of the defendant. Before the indorsement upon the note was entitled to be received in evidence, preliminary evidence of its execution should have been presented. No offer was made to show that the signature of J. E. Hayner & Co. was genuine, and as the defendant had put the existence of the indorsement in issue by denying its execution, the trial court very properly refused to let the indorsement go to the jury, in the absence of the necessary preliminary evidence;

Savings Association v. Barber.

but the instruction to the jury by the trial court to return a verdict for the defendant upon the pleadings and evidence was error. The answer admitted that the note had been transferred to the plaintiff. A note payable to order may be sold and transferred without indorsement, but of course thus transferred it is not negotiable. Upon the admissions in the answer, and the fact that the plaintiff was in the possession of the note, the plaintiff was entitled to judgment, in the absence of all evidence that the note was given without consideration. To protect the plaintiff as a *bona fide* holder and thereby to cut off the defense of the want of consideration, it was incumbent upon the plaintiff to establish that it held the note by written indorsement, and if the plaintiff had offered evidence proving the execution of the indorsement, the burden of proof would have been upon the defendant to establish that the indorsement was made after maturity. Even if there was no written indorsement, none was necessary to enable the plaintiff to sue in its own name. A negotiable promissory note may be assigned orally, and the mere delivery for a valuable consideration will pass the title. Possession of a note—where it does not appear upon the note who the owner thereof is—is *prima facie* evidence of ownership. (*Williams v. Norton*, 3 Kas. 295; *Eggan v. Briggs*, 23 id. 710.) After the plaintiff failed to prove the genuineness of the indorsement of the note, it was still entitled to judgment thereon, unless the defendant had made out his case of the failure of consideration. The latter offered no evidence to support his defense; and therefore the trial court should not have given the instruction to the jury which appears in the record.

The judgment of the district court must be reversed, and the cause remanded for a new trial.

All the Justices concurring.

Crippen v. Chappel.

HENRY C. CRIPPEN, *et al.*, v. JULIA A. CHAPPEL, *et al.*

1. **STRANGER Paying Debt; Subrogation.** Where a stranger, a mere volunteer, a mere intermeddler, pays the debt of another, he cannot be subrogated to the rights of the creditor.

2. ——— **Request to Pay; Mortgage; Subrogation.** But where a person pays a debt, which is secured by a mortgage, at the instance and request of the debtor, with the agreement that the person paying the debt shall have a mortgage lien upon the real estate then mortgaged to secure such debt, and a new mortgage is given but is void, the party furnishing the money may be subrogated to the rights of the original creditor.

3. **ADMINISTRATOR; Mortgage; Subrogation.** And this rule applies where an administrator borrows money to pay a debt of his intestate's estate. In other words, where a debt is due against the estate of a deceased person, and such debt is secured by a mortgage on the real estate of such deceased person, and the administrator whose duty it is to pay such debt borrows the money therefor from a third person, with the agreement and understanding between them that such third person shall be reimbursed from the assets of the estate, and such third person shall be secured by a mortgage lien upon the previously-mortgaged property of such estate, and for that purpose a mortgage on the previously-mortgaged property is executed by the administrator to such third person, which mortgage is void because of a want of power in the administrator to execute the same, but in pursuance of such mortgage and with the agreement and understanding between the administrator and the loaner of the money, the money is loaned and is paid to the original mortgagee, *held*, that such third person may then be subrogated to the rights of the original mortgagee.

Error from Washington District Court.

ACTION brought by Chappel against Crippen, Lawrence & Co., and others, for the partition of certain real estate. To the answer of defendants, Crippen, Lawrence & Co., the plaintiff demurred on the ground that it does not state facts sufficient to constitute any defense to her petition. The demurrer was sustained at the November Term, 1884. This ruling said defendants bring here for review. The opinion states the facts.

Garver & Bond, for plaintiffs in error.

Omar Powell, for defendants in error.

35	495
38	498
43	550
35	495
49	521
35	495
53	47
35	495
56	754
35	495
90	589
35	495
63	502
63	504
35	495
66	518
35	495
168	452
35	495
177	38

Crippen v. Chappel.

The opinion of the court was delivered by

VALENTINE, J.: This was an action for the partition of real estate, brought in the district court of Washington county, by Julia A. Chappel against Henry C. Crippen and H. Francis Crippen, partners as Crippen, Lawrence & Co., and others. The petition alleged, among other things, that the plaintiff and the defendants other than Crippen, Lawrence & Co. were joint owners of the property in question, and that Crippen, Lawrence & Co. claimed to have some interest in the premises; and the plaintiff prayed for partition between herself and the defendants other than Crippen, Lawrence & Co., and prayed that the claim of Crippen, Lawrence & Co. be adjudged to be null and void. For answer to this petition, Crippen, Lawrence & Co. set forth, among other things, that the land in question had previously belonged to Philemon Chappel; that on January 11, 1883, he died, leaving as his heirs Julia A. Chappel, his widow, and the co-defendants of Crippen, Lawrence & Co.; that at that time the property in question was incumbered by a mortgage lien to secure the payment of a debt of \$500 and interest, due July 1, 1883, to Joseph P. Drewett, for which debt the intestate was personally liable. On March 16, 1883, I. H. Chase was duly appointed administrator of Chappel's estate, and on July 2, 1883, he obtained an order from the probate court authorizing and directing him as such administrator to re-mortgage the property for the purpose of raising money to pay the aforesaid debt and to discharge the aforesaid mortgage. Pursuant to such order the administrator applied to Crippen, Lawrence & Co. for and obtained from them a loan of \$500 for the purpose of paying off and discharging said debt and mortgage to Drewett, and for this loan the administrator gave his note and mortgage on the property in question, both of which were executed by him as administrator. On the faith of this last-mentioned note and mortgage, and of having as security for the said loan a first lien upon the land in question, Crippen, Lawrence & Co. advanced said sum of \$500 by paying the

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same to Drewett in satisfaction of his claim and mortgage lien. Upon the foregoing facts, the defendants Crippen, Lawrence & Co. prayed that they be adjudged to have a valid lien on the property in question for said sum of \$500 and interest, by virtue of the mortgage executed to them by the administrator; or, if that could not be done, then that they be subrogated to the lien of the Drewett mortgage. To this answer the plaintiff interposed a demurrer, on the ground that the answer did not state facts sufficient to constitute any defense to her petition, which demurrer was sustained by the court. The defendants Crippen, Lawrence & Co. excepted, and to reverse the ruling of the district court in sustaining such demurrer they bring the case to this court, making the plaintiff below and all the defendants below aside from themselves defendants in error.

It seems to be admitted that the mortgage executed by the administrator to Crippen, Lawrence & Co. is void, and void, not because of any irregularity in its execution, but void because administrators in this state have no power or authority under the law to execute mortgages; and there is no claim in this case that the deceased had executed any will giving the administrator any such authority. It would therefore seem to be admitted that the mistake of the administrator and of Crippen, Lawrence & Co. in executing and receiving the aforesaid mortgage was a mistake of law and not one of fact. It also seems to be admitted by the parties that the only question presented to this court for consideration is whether the defendants Crippen, Lawrence & Co. can be subrogated to the rights of Drewett under his mortgage.

We shall assume that the mortgage executed by the administrator to Crippen, Lawrence & Co. is absolutely void, because of a want of power in the administrator to execute the same, (*Black v. Dressell's Heirs*, 20 Kas. 153,) and that it is worthless for all purposes except merely for the purpose of showing the understandings and the intentions of the administrator and Crippen, Lawrence & Co. when the money was loaned, and when the Drewett debt and mortgage were

Crippen v. Chappel.

paid and satisfied. Nor is there any express authority given by the statutes of Kansas to administrators to borrow money on account of their estates. It is the duty, however, of administrators to pay all debts against their estates, whether such debts are secured by mortgages or other securities, or not secured at all; and for this purpose the administrator may first sell all the personal property of the estate not exempt, if necessary, and may then sell all the real estate of the estate, not exempt, if necessary. In other words, all the estate of a deceased person, real and personal, except certain exemptions which have nothing to do with this case, is pledged by law for the payment of the decedent's debts, and the administrator may use the decedent's estate for that purpose. The question, then, to be considered in this case is whether, when a debt is due against the estate of a deceased person, and such debt is secured by a mortgage on the real estate of such deceased person, and the administrator whose duty it is to pay such debt borrows the money therefor from a third person with the agreement and understanding between them that such third person shall be reimbursed from the assets of the estate, and that such third person shall be secured by a mortgage lien upon the previously-mortgaged property of such estate, and for that purpose a mortgage on the previously-mortgaged property is executed by the administrator to such third person, which mortgage is void because of a want of power in the administrator to execute the same, but in pursuance of such mortgage and of the agreement and understanding between the administrator and the loaner of the money, the money is loaned and is paid to the original mortgagee, may such third person be then subrogated to the rights of the original mortgagee, and thereby obtain substantially what he was to obtain by virtue of the agreement and understanding between himself and the administrator, and which in justice and equity he ought to obtain? Under such circumstances, it can hardly be claimed that such third person is a stranger to the transaction as between the debtor and the creditor, a mere volunteer, a mere intermeddler, for the money was ad-

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vanced and the prior mortgage paid at the instance and request of the very person who was liable to pay the same, and whose duty it was to pay the same; and yet it is claimed by the plaintiff below and by all the defendants in error, that Crippen, Lawrence & Co. were in fact, and in law, and in equity, mere strangers, mere volunteers, mere intermeddlers. It will be admitted that if Crippen, Lawrence & Co. were

1. Debt paid by
stranger;
subrogation.

mere strangers, mere volunteers, mere intermeddlers, without any contract or understanding between themselves and the party whose duty it was to pay the debt, or between themselves and the original mortgagee, they could not now rightfully claim any such thing as subrogation or equitable assignment. It always requires something more than the mere payment of the debt in order to entitle the person paying the same to be substituted in the place of the original creditor. It requires an assignment, legal or equitable, from the original creditor, or an agreement or understanding on the part of the party liable to pay the debt, that the person furnishing the money to pay the same shall in effect become the creditor, or the person furnishing the money must furnish the same either because he is liable as surety or liable in some other secondary character, or for the purpose of saving or protecting some right or interest, or supposed right or interest, of his own. But the right of subrogation or of equitable assignment is not founded upon contract alone, nor upon the absence of contract, but is founded upon the facts and circumstances of the particular case and upon principles of natural justice; and generally, where it is equitable that a person furnishing money to pay a

2. Subrogation;
rule.

debt should be substituted for the creditor or in the place of the creditor, such person will be so substituted. Now, while we have not been referred to nor have we found any case precisely analogous to this case, yet we think that under the general doctrine of subrogation or of equitable assignment, this case comes within such doctrine. See the following authorities: Sheldon on Subrogation, § 8, and cases there cited; 1 Jones on Mortgages, § 874, *et seq.*, and

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cases there cited; Boone on Mortgages, §§ 135, 136; Freeman on Void Judicial Sales, §§ 50, 51, and cases there cited; 3 Pomeroy on Eq. Jur., § 1212, and cases there cited; *Ayres v. Probasco*, 14 Kas. 177, 198; *Johnson v. Moore*, 33 id. 90; *Everston v. Central Bank*, 33 id. 352, *et seq.*, and cases there cited; *Levy v. Martin*, 48 Wis. 198; *Morgan v. Hammett*, 23 id. 30; *Blodgett v. Hitt*, 29 id. 170; *Homeo. Mut. Ins. Co. v. Marshall*, 32 N. J. Eq. 104; *Tradesmen's Building &c. Ass'n v. Thompson*, 32 id. 133; *Tyrell v. Ward*, 102 Ill. 29; *Scott v. Dunn*, 30 Am. Dec. 174, and note, 177, *et seq.*, and cases there cited; *Gilbert v. Gilbert*, 39 Iowa, 657; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; *Hines v. Potts*, 56 Miss. 347; *Caldwell v. Palmer*, 6 Lea, 652; *Carter v. Taylor*, 3 Head, 30; *Mosier's Appeal*, 56 Pa. St. 76; *Capehart v. Hoon*, 5 Jones's Eq. 178; *Lockwood v. Marsh*, 3 Nev. 138.

It is true there was no contract between Crippen, Lawrence & Co., and either the administrator or the holder of the original mortgage that the original mortgage debt should itself be transferred or assigned to Crippen, Lawrence & Co.; but as we have before stated, the doctrine of subrogation or equitable assignment is not founded upon contract alone, but is founded upon facts and circumstances and upon the principles of natural justice. The mortgage debt in this case is one that could lawfully and properly be assigned, and it would be as much the duty of the administrator to pay the assignee after the assignment as it was to pay the original holder of the debt before the assignment; and in all such cases the debt is the principal thing and the mortgage and mortgage lien are only incidents thereto. When the debt is assigned, the mortgage and the mortgage lien are also assigned; and as the administrator was bound in law and in equity to pay the debt, whether it was assigned or not, he had the same right to agree that the same should be assigned, or that some other person by assignment should become the holder of the same as any other debtor has under like circumstances. For instance, he could have properly consented that Crippen, Lawrence & Co. should become the holders of the debt due from the estate to Drewett; and

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when they became the holders of the debt, they would also become the holders of the mortgage and the mortgage lien, for these things follow the debt as incidents thereto. Therefore, while there was no direct agreement between the administrator and Crippen, Lawrence & Co. that the latter should become the holders of the original mortgage debt, yet we think that

3. Administrator;
mortgage;
subrogation.

under the agreements that were in fact made, and under the other facts and circumstances of the case, the principles of equity will step in and assign the debt to Crippen, Lawrence & Co.; and with the debt, the mortgage, and the mortgage lien, as incidents thereto will go. If these views are correct, and we think they are, then Crippen, Lawrence & Co. have a right to recover in this action under the doctrine of subrogation, or what may perhaps more properly be termed equitable assignment.

The defendants in error cite the following authorities: 4 Wait's Actions and Defenses, ch. 97, 98; Bishop on Contracts, § 155; 2 Pomeroy's Eq. Jur., §§ 841, 851; Schouler's Executors and Administrators, § 214; Boone on the Law of Mortgages, § 140; *Sanford v. McLean*, 3 Paige's Ch. 117; same case, 23 Am. Dec. 773; *Clark v. Moore*, 76 Va. 262; *Shinn v. Budd*, 14 N. J. Ch. 234; *Coe v. N. J. Midl. Rly. Co.*, 31 N. J. Eq. 105; *Wormer v. Waterloo Agri'l Works*, 62 Iowa, 699; *Salmond v. Price*, 13 Ohio, 400; *Watson v. Wilcox*, 39 Wis. 643.

Some of the foregoing authorities may announce doctrines at variance with the views which we have expressed, and yet we do not think that any case like the one we have now under consideration has ever been decided differently from the decision which we now make. Besides, this decision does eminent justice in the case, and any other decision would permit parties to perpetrate gross injustice.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

35 502
54 574PORTER S. ROBERTS v. CHARLES S. RADCLIFF, as Sheriff
of Saline County.

1. *SALE—Fraud—Verdict, Not Set Aside.* Where the good faith and validity of the sale of a stock of millinery by a failing debtor is challenged by the creditors, and it is shown that the vendee, who is a lawyer and real-estate agent residing in a distant city, and unacquainted with the millinery business, purchased all the property of the insolvent vendors for fifty per cent. of the cost-price, without taking an inventory of the same, and it appears that no money was paid by the vendee, but that the sale was made upon a long and unusual credit, the vendee giving his negotiable, unsecured, non-interest-bearing notes, due in six, twelve and eighteen months thereafter; and it is also shown that the sale was hurriedly made, in anticipation that the principal creditors were about to levy upon the goods and enforce the collection of their claims; and it was further shown that the vendors continued in the possession and control of the goods after the alleged sale, claiming to have been employed by the vendee: *Held*, That a verdict based on these facts, finding the sale to be invalid, will not be disturbed.
2. ——— *Intent to Hinder and Delay Creditors.* The sale of all the property of an insolvent debtor upon a long and unusual credit, where the necessary effect of which, as well as the intent of the parties, is to hinder and delay creditors in the collection of their claims, will be held void, although there may be an honest intention of the debtor to finally pay his entire indebtedness.

Error from Saline District Court.

REPLEVIN, brought by *Roberts* against *Radcliff*, as sheriff of Saline county. Trial at the November Term, 1883, and judgment for defendant. The plaintiff brings the case to this court. The opinion states the material facts.

John Foster, and *Chas. A. Hiller*, for plaintiff in error.

J. G. Mohler, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: Charles S. Radcliff, as sheriff of Saline county, seized a stock of millinery as the property of the Misses Maxey, under an attachment issued at the instance of

Opinion of the Court.

one of their creditors. Porter S. Roberts, who claimed to have purchased the goods about a week before the seizure, brought this action to recover the possession of the goods, and failing in his action, he comes to this court alleging error in the proceedings in the district court.

Numerous assignments of error were made, but only two of them are now insisted upon. The first is, that the verdict is not sustained by sufficient evidence and is contrary to law. The only controversy between the parties was in respect to the good faith and validity of the sale. It appears that the Misses Maxey, who had been engaged for some time in the millinery business at Salina, became financially embarrassed, and unable to meet the claims of their creditors. The plaintiff, who was a brother-in-law to the Misses Maxey, and a resident of Council Grove, learning of their embarrassed condition, went to Salina on January 22, 1883, for the alleged purpose of assisting them. Upon arriving there, he learned that they had been notified by a creditor who had an over-due claim of more than \$700, that they must raise \$200 on that day, and \$50 a week thereafter until the debt was paid, or legal proceedings would be immediately taken to collect the claim. On the morning of that day the plaintiff, who was a lawyer and real-estate agent, purchased the stock of millinery without taking an invoice thereof. Although the vendors and vendee both claimed and testified that it was a *bona fide* sale, there are many circumstances connected with and surrounding the transaction which afford ground for suspicion, and from which the jury might well infer not only that it was made with intent to hinder and delay creditors in the collection of their claims, but to defraud them as well. In addition to the circumstance that the purchase was made without the taking of an inventory by one unacquainted with the business or with the value of such goods, the plaintiff admits that he agreed to pay for them only fifty per cent. of the cost-price, which was but fifty per cent. of the indebtedness against the goods. Then, instead of paying cash for the goods, he gave negotiable, unsecured and non-interest-bearing notes, of equal

Roberts v. Radcliff, Sheriff.

amounts, due in six, twelve, and eighteen months respectively. By this transfer all the property of the insolvent debtors was withdrawn from the reach of their creditors, and this, with the long and unusual credit that was given, of necessity had the effect to hinder and delay their creditors.

The law presumes that the parties intend the usual and necessary consequences of their acts, and the jury could infer from the terms agreed on and methods employed, that the sale was made with the intent to hinder and delay creditors. But they were not left to inferences alone. It was admitted by the Maxeys that the transfer was hurriedly made, on account of a notice that the principal creditors were about to begin an attachment proceeding; and for the purpose of preventing them from appropriating the goods in payment of their claims. Roberts had knowledge that this was their purpose, and aided them in accomplishing it. It is true that Roberts and the Maxeys testified that the transfer was made in the interest of the creditors, so that all might share in the property and be treated alike, and with the intention that the entire indebtedness should be finally paid; but their declarations and conduct cannot be easily reconciled. Even if the Maxeys had an honest intention to pay the creditors in the end, they had no right to interpose obstacles to legal process, or to purposely dispose of their property in such a way as would hinder the creditors in the enforcement of their claims. The creditors are entitled to have the property of the debtor appropriated without delay to the payment of their claims, and a transfer made by the debtor where the intention or the necessary effect is to delay creditors, cannot be upheld. Here both vendors and vendee practically confess that their purpose in transferring the property was to delay the principal creditors in enforcing their claims; and this intent is of itself sufficient to avoid the transaction.

Another circumstance which tends to throw suspicion upon the transaction is, that the Maxeys continued in the possession and control of the property after the same as before the alleged sale. They claim to have been employed by Roberts as sales-

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women. Roberts did not intend to remove to Salina, nor to abandon his occupation as a lawyer and real-estate agent at Council Grove, and give personal attention to the millinery business at Salina. He returned home on the same day on which the purchase was made, without moving the goods, changing the sign, or giving any notice to the public that there had been a change of proprietorship, leaving to manage the new business of which he was unacquainted the same persons who had failed and become insolvent when managing and carrying on the same business for themselves. In § 3 of the statute of frauds, it is provided that —

“Every sale or conveyance of personal property unaccompanied by an actual and continued change of possession, shall be deemed to be void as against the purchasers without notice, and existing or subsequent creditors, until it is shown that such sale was made in good faith, and upon sufficient consideration.”

This rule, and the fact that no change of possession was made, places the burden of showing the transfer to be a *bona fide* one upon Roberts, and in this the jury may have found that he failed. A careful perusal of the testimony satisfies us that it is not only sufficient to sustain the verdict when assailed in this court, but that it abundantly justified the jury in the verdict which was rendered.

We have examined the instruction criticised by the plaintiff in error, and find nothing in it misleading, or which could have in any way prejudiced his interests.

The judgment will be affirmed.

All the Justices concurring.

Challiss v. Wylie.

WILLIAM L. CHALLISS V. MAMIE A. WYLIE.

1. **EMBEZZLEMENT; Waiver of Tort; Set-Off.** Where the agent or clerk of a principal is guilty of the embezzlement of his principal's goods, the principal may waive the tort if he chooses, and treat his cause of action against his agent or clerk as one arising upon an implied contract; and if the agent or clerk is the owner of a note executed by the principal, in an action thereon the principal may plead as a set-off to the note the value of his goods embezzled and converted to his own use by his agent or clerk.
2. **SET-OFF, Striking Out, Not Material Error.** An action was brought by the wife of W. upon a promissory note payable to her order. The defendant alleged in his answer that the wife was not the real party in interest, but that the husband furnished the consideration of the note and was the owner thereof, and also alleged a set-off existing in favor of the defendant against the husband for a sum exceeding the amount of the note. Upon motion of the wife, the set-off was stricken out. The other allegations in the answer were permitted to stand. The case was tried by the court, without a jury, and the court found that the plaintiff was the real party in interest, and thereon rendered judgment against the defendant. *Held*, That although the district court committed error in striking out the set-off, the error, under the findings, cannot be said to be material, as it did not affect or prejudice in any way the substantial rights of the defendant.

Error from Atchison District Court.

ACTION brought September 22, 1884, by *Mamie A. Wylie* against *W. L. Challiss*, to recover \$1,500 and interest upon a promissory note, of which the following is a copy:

"\$1,500.

ATCHISON, KANS., Feb. 15, 1883.

"One day after date, I promise to pay to the order of Mamie A. Wylie the sum of fifteen hundred dollars, for value received, to bear ten per cent. interest per annum from date; if the interest is not annually paid, to become as principal and bear the same rate of interest; payable without defalcation or discount. And I do hereby relinquish and waive all rights to the benefit of all laws in force in this state exempting personal property from levy or forced sale on any judgment, execution or attachment, or other legal process in the collection of the above debt, with five per cent. per month for damages if collected by attorneys.

[Signed]

W. L. CHALLISS."

Statement of the Case.

Indorsements on said promissory note as above described :
“Pay to the order of A. M. Wylie.—Mamie A. Wylie; A. M. Wylie.”

On December 1, 1884, the defendant filed an answer, alleging, among other things, that the plaintiff was not the real party in interest, and setting up that she never had any interest in the note, but that it was put in her name by R. W. Wylie, her husband, the real party in interest, as a part of a fraudulent scheme to secure the confidence of the defendant, then his employer, and thereunder to fraudulently appropriate defendant's goods in his care as such employé to his own use; that thereby the defendant was defrauded by said R. W. Wylie of his goods to the amount of \$2,000; that said R. W. Wylie was otherwise insolvent, and the defendant had no other remedy than by counterclaim in such action against R. W. Wylie, the real and only party of adverse interest to the defendant. The defendant also asked to have R. W. Wylie made a party to the action, and thereon that the pleadings be reconstructed to join issue upon defendant's claim, to the end that R. W. Wylie should be adjudged the real holder of the note and defendant's rights against him determined.

Upon plaintiff's motion to strike out, as not constituting any defense and as irrelevant and redundant, the said answer, the court sustained the motion in part, and struck therefrom all the allegations concerning the alleged counterclaim or set-off. Thereupon the plaintiff filed her motion for judgment on the pleadings, which was overruled, and the case was tried March 13, 1885, by the court, a jury being waived. The court made and filed the following conclusions of fact:

“1. On February 15, 1883, the defendant made and delivered his promissory note, payable to the order of the plaintiff, a true copy of which is attached to the plaintiff's petition as Exhibit A.

“2. Said promissory note was afterward indorsed by the plaintiff as follows: ‘Pay to the order of A. M. Wylie. (Signed) Mamie A. Wylie.’ And said A. M. Wylie afterward indorsed said note in blank, as follows: ‘A. M. Wylie.’

“3. At the commencement of this action the plaintiff was,

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and ever since said time has been, the indorsee and holder of said promissory note under said indorsement in blank."

And thereon the court filed the following conclusions of law :

"1. The plaintiff is entitled to a judgment against the defendant for the sum of \$1,500, together with interest thereon from February 15th, 1883, at the rate of ten per cent. per annum, being in all the sum of \$1,811.

"2. The plaintiff is entitled to a judgment against the defendant for costs of suit."

The defendant excepted to each conclusion of fact and law, and subsequently filed a motion for a new trial, which was overruled. The court rendered judgment in favor of the plaintiff and against the defendant for the sum of \$1,811, together with all costs. The defendant excepted to the rulings and conclusions of the court, and also to the judgment rendered, and brings the case here.

W. W. Guthrie, for plaintiff in error.

Smith & Solomon, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: We think the trial court committed error in striking out of the answer of Challiss his set-off against Robert W. Wylie for the sum of \$2,000. In this state, any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off and be pleaded as such in any action founded

upon contract; and a cause of action founded upon an implied contract may be pleaded in set-off as well as any other cause of action.

Even where a cause of action is founded upon a tort, a party may waive the tort if he choose, and treat his cause of action as one arising upon an implied contract. Wherever a person commits a wrong against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrong-doer to pay to the party injured the full value of all benefits resulting to such wrong-doer. And in

1. Embezzlement;
waiver of tort;
set-off.

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such a case the party injured may elect to sue upon the implied contract for the value of the benefits received by the wrong-doer. (*Stewart v. Balderston*, 10 Kas. 142; *Stevens v. Able*, 15 id. 584; *Read v. Jeffries*, 16 id. 534; *Tightmeyer v. Mongold*, 20 id. 90; *Fanson v. Linsley*, 20 id. 235.) The answer of Challiss alleged that Mrs. Mamie A. Wylie, the plaintiff, was not the real party in interest; that the consideration of the note sued upon was furnished by Robert W. Wylie, and that he was the actual owner of the note. If this was true, Challiss had the right to plead and establish his alleged set-off.

The material question in the case is, conceding the error of the court in striking out portions of the answer, was this error a material one; that is, did it affect or prejudice in any way the substantial rights of Challiss? After the trial court had sustained the motion of Mrs. Mamie A. Wylie to strike from the answer the alleged set-off of Challiss against Robert W. Wylie, there still remained in the answer the allegations that the plaintiff was not the real party in interest, as the owner of the subject-matter in controversy; that she was not entitled to make any claim of ownership to the note sued on, or any part thereof; but that, on the contrary, the entire consideration of the note at the time of its execution belonged to Robert W. Wylie; that he then had the consideration of the note in his possession and under his control, and was the actual owner thereof.

The action was tried, with consent of all the parties, by the court, without a jury. In support of the allegations of the answer, Challiss testified that in the month of May, 1884, after the execution of the note, he had a conversation with Mrs. Mamie A. Wylie concerning her knowledge and interest in the same; that she told him that she didn't know anything about the note, and had never seen it. Robert W. Wylie testified, in rebuttal, on the part of Mrs. Mamie A. Wylie, that he acted as agent for his wife when he took the note from Challiss; that the money for which the note was given was in the bank at the time of its execution, in his own name; that

Challiss v. Wylie.

he drew his individual check therefor, and had it transferred to the account of Challiss; that he counseled with his wife before he loaned the money; and that he made the note payable to her. It was also shown that the note was subsequently indorsed as follows: "Pay to the order of A. M. Wylie. (Signed) Mamie A. Wylie." Subsequently, it was indorsed with the name of "A. M. Wylie." The trial court rendered judgment for Mrs. Mamie A. Wylie against the defendant for the full amount of the note, with interest and costs.

The special findings of fact made by the court in no way conflict with the conclusion of law and the judgment rendered. Upon the findings of fact and the judgment rendered, it is clear that the trial court found that Mrs. Mamie A. Wylie was the real party in interest, and entitled to recover. Therefore, upon the evidence, the court found as a fact that the allegations of Challiss in his answer were not true. One of the findings of fact is, "that at the commencement of the action the plaintiff was, and ever since said time has been, the indorsee and holder of the promissory note sued on." Now the possession of a note, where the note itself and the indorsements thereon do not show who the owner is, is *prima facie* evidence that the person in possession is the owner and has good title to it. (*Eggen v. Briggs*, 23 Kas. 710.) If Challiss had been successful in showing that Mrs. Mamie Wylie was not the owner of the note, and therefore not the real party in interest in the action, the error of the trial court in striking out his alleged set-off would have been material and prejudicial. As the court, however, found otherwise, we can see no reason for disturbing the judgment rendered. It is admitted that the note was payable to the order of Mrs. Mamie A. Wylie; that Challiss knew this at the execution of the same. At that time it does not appear that Robert W. Wylie was indebted to any person. Even, therefore, if the money for which the note was given was the individual property of Robert W. Wylie, he had the lawful right to give it to his wife. If thereafter, and before the wrongs committed by Robert W. Wylie, the wife became

2. Striking out
set-off, not
material error.

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the holder and owner of the note by gift of her husband, her ownership in the same was as full and complete as if she furnished her own money for the consideration of the note. It appears from the evidence that she must have seen and known of the note, as she at one time indorsed it to A. M. Wylie. A. M. Wylie subsequently indorsed it, and the finding of the court is, "that at and before the commencement of the action Mrs. Mamie A. Wylie was the indorsee and holder thereof." If Challiss, at the execution of the note, had desired to protect himself against any misconduct of Robert W. Wylie as his manager or clerk, he might, if the parties had consented, have made the note payable to Robert W. Wylie only, and thereby rendered it non-negotiable. If at the time of the execution of this note, Robert W. Wylie had been contemplating and planning the embezzlement, which it is alleged he subsequently committed, it would seem that he might have more readily secured the confidence of Challiss by making the note negotiable and payable to his own order. He could then have transferred it to his wife or to any other *bona fide* holder, so as to be freed from any counterclaim or off-set of Challiss. Where a case like this is tried by the court without a jury, the court, in its discretion, may direct the manner in which evidence shall be received. For instance, in this case, if the alleged set-off of Challiss had not been stricken out, the court could have directed before hearing any evidence concerning the set-off, that it would hear first the evidence whether the plaintiff was the real party in interest; and if, upon the evidence submitted, the court was satisfied that the plaintiff was the real and only party in interest, it might then have refused any evidence to support the alleged set-off.

The judgment of the district court will therefore be affirmed.

All the Justices concurring.

Mason v. Spencer, County Clerk.

WASHINGTON MASON, *et al.*, v. CHARLES F. SPENCER,
County Clerk, *et al.*

1. CONSTITUTIONAL LAW; *Valid Statute.* Section 2, chapter 95 of the Laws of 1885, attempting to cure irregularities in the construction of sewers in cities of the first class, is constitutional and valid.
2. ——— *Curative Statute.* Where an irregularity rendering an act of a city or subordinate agency illegal or void is simply a failure to comply with some provision of the statutes, the compliance with which the legislature might in advance have dispensed with, the legislature can, by a general curative statute subsequently passed, dispense with such compliance and thereby render the act of the city or subordinate agency legal and valid.
3. SEWER TAXES; *Apportionment.* Where sewer taxes in a city are levied in accordance with the value of the lots without the improvements thereon, *held*, that such rule of apportionment of the taxes is valid.

Error from Shawnee Superior Court.

ACTION brought by *Washington Mason* and seventy-nine others, against *Charles F. Spencer*, as county clerk, and others, to enjoin the defendants from collecting certain sewer taxes levied by the city of Topeka. The amended petition in this case, omitting court and title, reads as follows:

"For cause of action against the defendants, the plaintiffs say: That they are the owners, each and severally in fee simple, of certain real property in the city of Topeka, an incorporated city of the first class, in Shawnee county, and that said real property is within the corporate limits of said city. A schedule containing a description of the lots owned by each of the plaintiffs separately is attached to, filed with and made a part of this petition, marked 'A,' and to which reference is here made.

"In or about the year 1880 the mayor and council of the city of Topeka caused to be constructed a general sewer, running in the alley between Jackson and Van Buren streets, from the Kansas river south to the state-house grounds in the city of Topeka. Said sewer is a large brick general sewer, and is now used by all the property abutting thereon, and is also used as a general sewer for the reception or connection of all sewers constructed by said mayor and council since that date, save and except one, designated in ordinance No. 576 as main sewer district

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D. A copy of said ordinance No. 576 is hereto attached, marked 'B,' and made a part hereof. Said general sewer so constructed in 1880 was paid for out of the general fund of said city, and each of the plaintiff's separate property was taxed to pay for the same.

"Certain persons in the years 1882 and 1883 constructed sewers in certain localities in the city of Topeka without any contract or authority of law, designated certain territory in said city as main sewer districts and sub-sewer districts, and the same were so designated and formed long after the construction of said sewers before mentioned, and said districts and sub-districts are not composed of the same territory as originally intended, and plaintiffs' said property is situated in said pretended main sewer districts 'B' and 'D' and pretended sub-districts Nos. 1, 2, 3, 4, 5, 6, and 7, and plaintiffs' property before mentioned has once before paid for sewers in the same territory or main district.

"Certain persons are using said sewers, whose property lies adjacent to but is not included in any of said sewer sub-districts, and which said property has not been assessed in any manner or in any sum whatever on account of said sewers. The sewers so constructed in 1882 and 1883 were negligently and unskillfully built and constructed of poor material, in this, to wit, the sewer in the alley between Kansas avenue and Quincy street in main district 'D,' from Second street to Tenth avenue, and in the east and west alley between Sixth avenue and Seventh street, and in rear of lots 40, 42, 44, 46 and 48 Eighth avenue east, in main district 'B,' are not deep enough to properly drain the lots abutting thereon, and said property is not benefited, and thereby casting a heavier burthen, to wit, the whole cost of said sewers, upon one-half the lots along said line.

"Plaintiffs further say that no cement was used around the joints of tile, and none of said sewers were tamped; that no sufficient number of T joints were put in to connect with the adjacent buildings; that no elbows were used at many of the turns, and many broken tile were used therein, thereby rendering said sewers liable to clog and fill up and become useless; that at many places in said sewers there is no grade, and water stands on the bottom of said sewers, particularly in the rear of lots 220, 222, 224 and 226 Kansas avenue, and 205, 207, 209, 211, 213 and 215 Van Buren street, and that said property is not benefited thereby; that all the sewer sub-districts are so wrongfully, illegally and unjustly formed as

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to omit a large number of valuable lots and parcels of ground which lie adjacent to said sub-districts, and are not benefited thereby, to wit, all the lots and parcels of ground on the north side of Fifth street, between Topeka avenue and Kansas avenue, and on the west side of Jackson street, from lot 167 south to Seventh street; also, all the lots and parcels of land lying on the east side of Van Buren street, from lot 168 south to Seventh street, and all the lots and parcels of ground lying between Eleventh and Twelfth streets and Van Buren and Topeka avenue; also, all the lots and parcels of ground lying on the east side of Quincy street from Second street to lot 168 on Quincy street—and by reason thereof the property of these plaintiffs bears a heavier proportion of the cost of said sewers than in justice and equity they ought to bear; that the aggregate of all assessments made for sewers in said sub-districts 1, 2, 3, 4, 5, 6, and 7, is largely in excess of the actual cost of said sewers, and largely in excess of what sewers would have cost if built for cash, and largely in excess of what said sewers are reasonably worth, and largely in excess of the benefits to said property by reason of the construction of said sewers; that the mayor and council of said city did not, before said sewers were built and constructed, have or cause a detailed estimate of the cost thereof to be made under oath by the city engineer of said city of Topeka, but wholly failed and neglected so to do; that at the time said sewers were constructed, the city of Topeka had no money or funds on hand or in its treasury with which to pay for the construction of said sewers, and that the parties who bid for the work of constructing said sewers had full knowledge of that fact at the time he or they bid therefor, and well knew that scrip warrants or other evidence of indebtedness of the city of Topeka, payable out of an empty treasury, would be issued to the person or persons for the price or cost of constructing said sewers, and by reason thereof all bids thereof for the constructing of said sewers were based or made on a scrip or credit basis, and were one hundred per cent. higher than they would have been for cash, and one hundred per cent. more than said work could have been done for cash, and one hundred per cent. more than said work was reasonably worth, all of which the said mayor and council well knew at the time they permitted said sewers to be built, and caused said scrip warrants or evidence of indebtedness of the city of Topeka to be issued as hereinafter stated; that the mayor and council of said city wrongfully and without authority of law issued scrip orders, warrants or

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evidence of indebtedness of the city of Topeka to the person and persons who constructed and built said sewers, in a large amount, to wit, the sum of forty-four thousand dollars, well knowing that there was no money in the treasury of said city at that time to pay the same; that the persons holding said scrip orders, warrants or evidence of indebtedness of the city of Topeka are now claiming and demanding to be paid the sum of money so evidenced as indebtedness of said city, by scrip warrants or orders, and the mayor and council of said city have arbitrarily, without notice, and without regard to benefits conferred upon said property by reason of the construction of said sewers, and without regard to the benefits to the streets and alleys, and without regard to the benefits derived by the community at large as a sanitary measure, have charged the whole of said illegal cost of the said sewers to the property in said sewer sub-districts, and including a large sum, to wit, three thousand dollars, for grading and rip-rap at the mouth of said sewer; that the defendant Charles F. Spencer was duly elected and qualified, and is now the county clerk of Shawnee county; that defendant A. J. Huntoon was duly elected and qualified, and is now the treasurer of said county; that defendant A. W. Knowles was duly appointed and qualified, and is now the city treasurer of the city of Topeka, Kansas; that the defendant A. W. Knowles, as such city treasurer, has now on hand, or will soon receive into his possession, a large sum of money, to wit, the sum of about twenty thousand dollars, which defendant says is applicable thereto, and is about to pay a portion of said sewer scrip of 1883 so illegally issued as aforesaid, unless restrained by the order of this court.

"Plaintiffs further say that the said mayor and council of the city of Topeka have levied an assessment upon all the lots and pieces of ground in said sewer sub-districts, including the property of plaintiffs aforesaid, and the city clerk of the city of Topeka has certified said assessment to the county clerk of Shawnee county, to be by him placed upon the tax-roll of said county for collection, and for the purpose of paying for the construction of said sewers; that defendant Charles F. Spencer, the county clerk aforesaid, has placed the said assessment on the tax-roll of said county for the year 1885, and delivered the same to the treasurer for collection as aforesaid, and defendant A. J. Huntoon, the treasurer of said county, is threatening and intending to collect the same for said purpose.

"Plaintiffs say that if said defendant the county clerk is

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permitted to leave said assessment upon the tax-roll of said county for collection, and said defendant the treasurer of said county is permitted to collect, or either of said defendants is permitted to do what he or they are threatening to do in relation thereto, and without authority of law, it will greatly increase the amount of taxes they will each be required to pay on their said property, and greatly injure and decrease both the rental and market value thereof, and will cast a cloud upon the several plaintiffs' titles to said real property, and have the same effect as a perpetual incumbrance on said plaintiffs' real property aforesaid, and work to each of said plaintiffs a great and irreparable injury and damage.

"The plaintiffs further say, that on the 30th day of August, 1884, the district court of Shawnee county, in a suit then pending in said court, wherein F. G. Hentig and others were plaintiffs and the clerk and treasurer of said county and the city of Topeka were defendants, No. 6266 of that court, granted a perpetual injunction against defendants, enjoining and restraining defendants from collecting the said tax in said petition mentioned, and from doing anything toward the collection of the same. And on the 24th day of April, 1885, the said court granted a perpetual injunction in a suit then pending in said court, in which H. K. Rowley, on behalf of himself, and all others in like situation, were plaintiffs, and Bradford Miller, as county treasurer, and the city of Topeka were defendants, which said suit was No. 6546, perpetually enjoining the defendants from collecting the said taxes in said petition complained of, and from doing any act or thing toward the collection of the same.

"And plaintiffs further say that this tax is levied for the same purpose and the same illegal debt as the one enjoined in the suits above mentioned, and that the property of these plaintiffs is the same, and these plaintiffs were parties to said suits, and that the first suit mentioned, to wit, No. 6266, was by the defendants appealed to the supreme court of the state, and the judgment of the said district court affirmed, and that said above-mentioned cause, No. 6546, remains unreversed, and said judgments are now good, valid and subsisting judgments against said defendants.

"Wherefore, plaintiffs pray that defendants Chas. F. Spencer as county clerk, A. J. Huntoon as county treasurer of said county of Shawnee, the city of Topeka, and each of them, and their successors in office, may be temporarily restrained and enjoined from continuing said assessment on the tax-roll

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of said county, and from collecting the same or any part thereof, and from doing any act or thing toward the collection of said illegal tax, until the final hearing of this cause; and that defendant A. W. Knowles, as treasurer of the city of Topeka, and the city of Topeka may be enjoined and restrained from paying any of the said scrip warrants or evidence of indebtedness of said city mentioned herein, and known as sewer scrip of 1883; at which time said plaintiffs pray that said injunction may be made perpetual. And plaintiffs pray for other and proper relief in the premises."

The defendants demurred to the plaintiffs' amended petition upon the ground that it does not state facts sufficient to constitute a cause of action. At the January Term, 1886, the court sustained the demurrer. This ruling plaintiffs bring here for review.

F. G. Hentig, for plaintiffs in error.

J. H. Moss, and *John T. Morton*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Washington Mason and others, in the superior court of Shawnee county, to enjoin the defendants, Charles F. Spencer, county clerk, and others, from collecting certain sewer taxes levied by the city of Topeka upon certain lots in such city belonging to the plaintiffs, which taxes are alleged to be illegal and void. The plaintiffs also applied for a temporary injunction. This application was heard upon evidence, and the court below refused to grant the injunction. The defendants demurred to the plaintiffs' petition upon the ground, among others, that the petition did not state facts sufficient to constitute a cause of action, and the court below sustained the demurrer. To reverse this ruling the plaintiffs bring the case to this court.

Some of the principal facts involved in this case are reported in the case of *Gilmore v. Hentig*, 33 Kas. 156, *et seq.* After the case of *Gilmore v. Hentig* was decided by the supreme court, and on March 2, 1885, the legislature passed an act which it is claimed cures all the irregularities which occurred in the original construction of the sewers or in connection

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therewith. That portion of the act which has application to this case, reads as follows :

"SEC. 2. That in any case where any sewer or sewers have been heretofore constructed in any city of the first class by order of or under contract authorized in fact by the mayor and council thereof by resolution or ordinance, and the same shall not have been fully paid for, the mayor and council of such city shall have authority at any time to make provision for such payment by the levy of taxes upon the property properly taxable therefor at large or in the proper district as originally intended, or the issue of the bonds of such city, or the warrants or other evidences of indebtedness of such city, to amount not exceeding the amount of such principal indebtedness and interest at the rate of not to exceed seven per centum from time when same shall have been paid ; or may re-fund or re-issue any bonds or other evidences of indebtedness which may in fact have been theretofore issued on account of any such improvement and then remaining unpaid." (Laws of 1885, ch. 95.)

After the foregoing statute was passed by the legislature, the city of Topeka again levied taxes to pay for the sewers mentioned in the case of *Gilmore v. Hentig*, ante; and these are the taxes which the plaintiffs now claim are illegal and void. It is claimed they are illegal and void for the reasons given in the said case of *Gilmore v. Hentig*; and also for the reason that the foregoing statute is unconstitutional and void.

It is claimed that the foregoing statute is unconstitutional and void for the reason that its passage by the legislature was the exercise of judicial power, and not the exercise of legislative power. This point must be overruled, and there is really so little in it that we do not think it is necessary to discuss the same.

The plaintiffs also claim that the foregoing "act is unconstitutional and void for the reason that it attempts to confer corporate powers upon certain cities only, and cannot possibly at any time apply to other corporations, public or private, and is in contravention of § 1, article 12, of the constitution." This point presents a much more difficult question. The plaintiffs refer to the case of *City of Topeka v. Gillett*, 32

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Kas. 431, as authority for their claim that the statute is unconstitutional and void. The two cases, however, are not alike. In the case of *City of Topeka v. Gillett*, the legislature attempted to confer corporate powers, while in the present case the legislature intended only to cure irregularities; not to create powers, but only to remove restrictions. In that case the legislature clearly intended that the act should be a special act, while in this present case we cannot say that such was the intention of the legislature. In that case it was intended by the legislature that the act should apply, not to a whole class, but only to a portion of a class, to wit, to only three cities of the second class out of ten such cities. At that time there were ten cities of the second class in the state of Kansas, and it was possible for the act to apply to three of them and to no more, and it was not possible for the act to apply to any other city or corporation; and the act was so limited with regard to the time for its operation that in all probability it could practically have operation only as to one of such cities—a single city. In the present case, however, the act is not only general in its form and general in its terms, but it is made to apply to an entire class of cities, and a class as broad and general as any class for which any of the general laws for cities of the first class are enacted. It applies to all cities of the first class, and the time given for its operation is not limited; and any city of the first class coming within its terms may act under it, or not, as it chooses. All that the statute attempts to do in the present case is to dispense with certain preëxisting legislative requirements; to cure certain irregularities existing because of a failure to comply with such requirements, and to relieve cities of the first class from what would otherwise be the effect of such irregularities. Such an act we think is constitutional and valid. As sustaining these views, see the cases of *City of Emporia v. Norton*, 13 Kas. 569; *Tift v. City of Buffalo*, 82 N. Y. 204. In connection with the last-mentioned Kansas case we would say, that it appears from the reports of the decisions of this court that in 1871 the city of Emporia, a city of the second class, levied special taxes to

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macadamize, curb and gutter a certain street. These taxes were held to be illegal and void because of certain irregularities; and this notwithstanding the fact that a *special* act of the legislature (Laws of 1872, ch. 13) had been passed for the purpose of curing such irregularities. (*Gilmore v. Norton*, 10 Kas. 491.) Afterward, the city of Emporia relevied the taxes, or rather levied other taxes of a similar character, under a *general* law passed after the improvements had been made, and passed for the purpose of curing irregularities such as had intervened in that case, and which rendered the previous taxes in that case illegal and void, which general law reads as follows:

"SEC. 41. In case the corporate authorities of any city have attempted to levy any taxes or assessments for improvement, or for the payment of any bonds or other evidence of debt, which taxes, assessments or bonds are, or may have been informal, illegal or void, for the want of sufficient authority or other cause, the council of such city, at the time fixed for levying general taxes, shall relevy and reassess any such assessments or taxes in the manner provided in this act." (Laws of 1872, ch. 100, § 41.)

This act of 1872 was enacted for cities of the second class and for them only, and it was held to be constitutional and valid, and the taxes levied under it were upheld and sustained. (*City of Emporia v. Norton*, 13 Kas. 569; *City of Emporia v. Norton*, 16 id. 236.) This act of 1872 was also in substance reenacted by the legislature of 1885, (Laws of 1885, ch. 101;) therefore the legislature of 1885 not only enacted the curative statute now in question, which applies only to cities of the first class; but it also enacted a curative statute, (said chapter 101, Laws of 1885,) of a similar character for all cities of the second class. By the enactment of these two statutes it clearly appears that the legislature of 1885 had no intention of passing special acts conferring corporate powers, as was the case when the legislature of 1875 passed the act held to be void in the case of *City of Topeka v. Gillett*, ante; but the legislature intended to pass only general laws.

1. Valid statute.

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We think that § 2 of chapter 95 of the Laws of 1885 is constitutional and valid.

This we think substantially disposes of this case. It is true that the plaintiffs have alleged a great many irregularities, but the object of the legislature in passing the foregoing statute, (ch. 95, Laws of 1885,) was to cure such irregularities, and we think they are cured. It would seem from the ordinance passed by the city of Topeka subsequent to the passage of the foregoing statute, that the city of Topeka in relevying the taxes, or rather in levying the present taxes, attempted not only to come within the provisions of such statute and of all other statutes as modified by this statute, but also attempted to come within and to comply with all the decisions of this court and all the suggestions made by this court in the case of *Gilmore v. Hentig*, ante, so far as such decisions and suggestions can apply to this case. The irregularities in the original proceedings of the city and its officers in connection with the construction of the sewers were in the main mere irregularities, mere failures to comply with certain provisions of the statutes which the legislature could have dispensed with by previous enactments if it had so chosen, and were therefore such irregularities as the legislature could waive or cure by subsequent enactment. It is a general rule that where the legislature can dispense with a thing or render it immaterial by prior enactment, it may dispense with such thing or render it immaterial by a subsequent statute. In other words, where an irregularity rendering an act of a city or subordinate agency illegal or void is simply a failure to comply with some provision of the statutes, the compliance with which the legislature might in advance have dispensed with, the legislature can by a general curative statute subsequently passed, dispense with such compliance and thereby render the act of the city or subordinate agency legal and valid. All the authorities support this proposition; and we think this case falls within them.

2. Curative statute may be passed.

As before stated, we think this case comes within the decision made in the case of *City of Emporia v. Norton*, 13 Kas.

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569. That some of the lot-owners may be required to pay more than a fair proportion of the cost of constructing the sewers, will not necessarily and of itself invalidate the taxes. The taxes in the present case were levied, as we understand, in accordance with the value of the lots without the improvements thereon, in accordance with the suggestion of this court in the case of *Gilmore v. Hentig*, ante, and in accordance with the decisions of the supreme court of Massachusetts in the cases of *Downer v. Boston*, 61 Mass. 277, and *Wright v. Boston*, 63 id. 233. In cases where all the lots taxed are actually benefited by the sewers, we think that such an apportionment of the taxes must be held to be legal and valid, although in some few instances on account of peculiar circumstances or mistakes in the appraisal of the lots, some one or more of the lot-owners may have to pay more of the cost of the construction of the sewers than is fairly his or their proportion to pay. Absolute and exact justice in such cases can never be attained. In all cases some persons will be required to pay slightly more, and some slightly less, than their fair proportion. We do not understand that any of the lots taxed in this case are not benefited by the sewers. All, as we understand, are benefited more or less, though some are benefited less than others, and some less than the amount of the taxes levied upon them. The taxes, however, are only equal to the actual cost and fair value of the improvements. We might further say in this case, that the plaintiffs have not tendered any portion of the taxes levied upon their lots, and therefore if in equity they should pay any portion of such taxes, they must fail in this action. (*City of Ottawa v. Barney*, 10 Kas. 270.)

We perceive no sufficient grounds for equitable interference in this case, and therefore the judgment of the court below will be affirmed.

All the Justices concurring.

HERBERT D. STETSON, *et al.*, v. W. H. H. FREEMAN.

1. **SHERIFF'S SALE; Amendment of Return; Notice; Practice.** In a return made on an execution of a sale of a city lot, the sheriff stated that the property was struck off to F., who refused to pay the amount of his bid, and that the execution was unsatisfied. At the succeeding term of court, H., the execution creditor, made a motion to require the sheriff to amend his return so as to conform to the facts, and to show that the lot was sold to her instead of to F., who was her attorney. The motion was resisted by the sheriff, and made and allowed without notice to the defendant in the execution. The sheriff thereupon amended his return showing a sale of the lot to H., and at the same term of the court the sale was confirmed, following which the sheriff conveyed the lot to the purchaser by a deed. Subsequently the defendant in the execution conveyed the same property to S. *Held*, In an action brought by the grantee of the purchaser at the sheriff's sale to quiet his title to the lot, that the return first made by the sheriff on the execution was not conclusive, and might be amended conformably to the facts upon the application of the purchaser, officer, or either of the parties to the action; and that as the application to amend was made prior to the confirmation of the sale, no new or additional notice to the defendant in the execution was necessary; and *held, further*, that the judgment and execution being valid, the sheriff's deed could not be attacked nor the proceedings impeached, in a collateral action.
2. **BOUNDARIES, General Reputation to Prove.** Where the identity and boundaries of city lots cannot be determined by the recorded plat, nor from any monuments on the ground, general reputation may be received to establish them, in the absence of evidence of a higher and better nature.

Error from Marshall District Court.

ACTION originally brought by J. C. Frissell and another against John V. Coon and E. J. Coon, partners under the firm-name of John V. Coon & Son, and Randall Stetson, to quiet their title to lot eleven on the county road within the city of Blue Rapids, and which they further describe by metes and bounds. It being made to appear to the court that the defendant Randall Stetson had transferred his right and interest in the property in dispute to *Herbert D. Stetson* and *William H. Tucker*, they were, upon application, made parties

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defendant, and permitted to file their answer. In it they allege that the sheriff's deed under which the plaintiffs claimed title to the lot, was executed by the sheriff without legal authority, and was void. They further allege that the land described in the plaintiffs' petition was not that which was described and intended to be conveyed by the sheriff's deed. Subsequently, the defendant John V. Coon filed an answer disclaiming any right or interest in the premises, and E. J. Coon answered that he claimed only under a tax deed which was admitted to be invalid. Afterward, it appeared to the court that the interest of the plaintiffs in the subject-matter of the action had been transferred to *W. H. H. Freeman* during the pendency of the action, who was by the agreement of the parties substituted for the plaintiffs; and the real controversy in the case was between *W. H. H. Freeman*, as plaintiff, and *Herbert D. Stetson* and *W. H. Tucker* as defendants. At the March Term, 1884, the cause was submitted to and tried by the court, and the following findings of fact and law were made:

"1. As conclusions of fact in this case, the court finds that since this suit was commenced, whatever title plaintiffs had has been conveyed to *W. H. H. Freeman*, and that whatever title defendant *Randall Stetson* had has been conveyed to *William H. Tucker* and *Herbert D. Stetson*; also that the firm of *John V. Coon & Son* had no right or title to said premises, except that *Emir J. Coon*, a member of the firm of *John V. Coon & Son*, has a tax deed to said premises, which deed it is admitted, however, is invalid, but it is also agreed that said *Emir J. Coon* has a lien by virtue of said tax deed for the sum of \$27.15, and that the real controversy is between said *W. H. H. Freeman* and the said *William H. Tucker* and *H. D. Stetson*, who have by leave of court filed an answer herein.

"2. The property described by metes and bounds in the petition, and which the plaintiff claims, is lot eleven on the county road in the city of *Blue Rapids*, *Marshall county*, *Kansas*, and is of the value at this time of about \$2,000.

"3. There are two objections made to the plaintiff's title by said defendants *Tucker* and *Herbert D. Stetson*: first, that the sheriff's deed under which the plaintiff claims, is invalid;

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and second, that if invalid it does not convey all of the metes and bounds claimed by the plaintiffs in their petition.

"4. It is admitted that Jane F. Hathaway had a valid judgment against the Blue Rapids Town Company which was obtained on the 28th of March, 1877, and that the Blue Rapids Town Company at that time owned the premises described by the plaintiffs in their petition as follows, to wit, lot No. eleven on the county road in the city of Blue Rapids, Marshall county, Kansas, the said lot eleven being within the following metes and bounds, to wit, beginning at a round iron pin about two and one-half feet long, flattened near the top, with W. H. H. cut therein, and driven in the county road in the quarter-section line running north and south through the center of section twenty, township four, range seven, east, at a distance of one hundred seventy-five feet north from a stake on the said quarter-section line, said stake being two hundred thirty-two feet west from the west end of the iron bridge crossing the Big Blue river in said city, and twenty-seven feet east of the northeast corner of D. Fairbanks's stone dwelling house situate on the west side of said county road, said stone being marked on the top with a cross thus, +; thence east from said iron pin to the northeast corner of what is known as John V. Coon & Son's gypsum mill; thence northerly along the outside of the sea-wall seventy-nine feet; thence west to a round iron pin about two and one-half feet long, flattened near the top, with the name 'Rix' cut in the same, said pin being on the said quarter-section line; thence south seventy-nine feet on said quarter-section line, to the said iron pin marked W. H. H., at the place of beginning, excepting therefrom a strip of land within said metes and bounds and along said quarter-section line recorded and dedicated as a part of the county road. [For this admission, see second defense in answer of Tucker and Stetson filed September 11, 1883.] It is further admitted that the title to said premises was in said Blue Rapids Town Company at the time of the levy of the execution under said judgment, and if not divested by the sale under said execution, that it was still in said town company at the date of the sheriff's deed made to Miss Hathaway on December 26, 1878. It is also admitted that at the commencement of this suit whatever rights Miss Hathaway acquired by said deed were in plaintiff, and that those rights are now in said W. H. H. Freeman.

"5. On the 13th of December, 1879, the Blue Rapids Town Company made a conveyance of whatever rights it had

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at that time in said premises to Randall Stetson, and since this suit was commenced he has conveyed his interest, whatever it may be, to said Tucker and Herbert D. Stetson.

"6. The sheriff, in making the levy under the execution on the Hathaway judgment, described the property levied upon as follows: On lot eleven, with fifty-horse water power attached, county road, street in the city of Blue Rapids, Marshall county, Kansas; also, the proceedings under said execution were regular, but the sheriff's return on said execution in regard to the sale of said lot eleven is as follows: 'And at the time and place stated in said notice, I offered the above lands and tenements above described for sale, to wit, lot eleven, with fifty-horse water power attached, county road, said lot being in the city of Blue Rapids, Marshall county, Kansas; and I did strike off to W. H. H. Freeman lot eleven, county road, with the fifty-horse water power attached, at and for the price of \$667, being two-thirds or more than two-thirds of the appraised value thereof of said lot so struck off to said W. H. H. Freeman, he being the highest and best bidder therefor, and afterward the said W. H. H. Freeman refused to pay the amount of his bid or any part thereof; and I hereby return said lot not sold for want of good and sufficient bids, and I hereby return this execution unsatisfied in whole or in part.' Afterward, at the next term of court, said Hathaway made a motion to compel the sheriff to amend his return showing a sale of said lot. She claimed that said Freeman was her attorney and made the bid in her behalf and not on his own account, and her judgment being large enough to cover the amount of said bid, and the court finding that said Freeman did bid for her and not for himself, said motion was allowed, and the said sheriff ordered to amend his return accordingly, which he did, and the sale was confirmed, and a sheriff's deed made to her December 26, 1878, in which the property was described as in the levy. The sheriff resisted this motion, but the Blue Rapids Town Company had no notice of the motion to compel the sheriff to amend his return, or of the motion to confirm.

"7. When the said Blue Rapids was platted and the plat filed, it embraced a strip of land lying north and south along the Big Blue river about two hundred and thirty-two feet wide, between what is called the county road running north and south, and the Big Blue river. This strip was platted into lots as long as said strip is wide, and about eighty feet wide, one end of which lots abutted on the river and the other on

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the said county road. One of the lots was numbered on said plat as lot eleven. A dam was erected across said river and a bridge built across the dam, which is the iron bridge referred to in the description in plaintiffs' petition. These lots were below the dam, and were intended as water-power lots; that is, lots upon which buildings might be erected containing machinery to be propelled by water power. This plat was filed for record January 28, 1871; no monuments were placed at the corners of said lots, and it was a very difficult matter to determine their exact boundaries. To avoid the trouble, the town company commenced to sell tracts of land from the place where said lots were located by metes and bounds, describing the boundaries of the lots. The first tract sold below the dam was to a man by the name of Waynant, for the purpose of erecting an oil mill; the next was sold to John V. Coon, for a gypsum mill; and the next tract of ground is what the plaintiff claims is lot eleven; and the next was sold to a paper-mill company. The foundation of the oil mill was erected; the gypsum mill has also been erected, and has been in operation. All of these buildings are substantial structures, built with stone, and costing, with the sea-walls, many thousands of dollars. What is claimed by the plaintiffs to be lot eleven, as they have described it in their petition by metes and bounds, does not interfere with the buildings either on the north or south. On the first day of June, 1875, a new plat was filed by the town company, and on this plat the lines dividing said strip of land into lots between the lots and the county road, were obliterated. There is no way now to determine from the recorded plat, either the first plat or the second plat, or from any measurement, exactly where lot eleven is or was, nor are there any monuments on the ground from which such boundaries can be ascertained with any degree of accuracy. If resort be had to the testimony of citizens or of any old residents of Blue Rapids as to their understanding of where lot eleven is, it lies between the gypsum-mill property and the paper-mill property, which is the ground described by the plaintiffs by metes and bounds as lot eleven, and was in the possession of the plaintiffs at the commencement of this action; and the court finds such to be the facts."

CONCLUSIONS OF LAW.

"As conclusions of law from the foregoing facts, the court finds that the plaintiffs are entitled to have their title quieted to said lot eleven as described by metes and bounds in their

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petition, subject to the lien of Emir J. Coon for \$27.15 by virtue of his tax deed, with interest at seven per cent. from date of judgment; and that plaintiffs should pay one-half the costs of this action, and that the other half should be paid by defendants W. H. Tucker and Herbert D. Stetson."

The court entered a decree quieting the title to the premises in controversy in *W. H. H. Freeman*, who had been substituted as plaintiff, against each of the defendants, except as to the tax lien of Emir J. Coon. H. D. Stetson and W. H. Tucker excepted to the rulings and decree of the court, and bring the case here for review.

John A. Broughten, and *John V. Coon*, for plaintiffs in error.

W. H. H. Freeman, defendant in error, for himself.

The opinion of the court was delivered by

JOHNSTON, J. : There are but two points urged here against the judgment rendered by the district court. The first of these arises upon rulings of the court in admitting in evidence the sheriff's deed, under which the defendant in error claims title, as well as the record of the preliminary proceedings upon which the deed was founded. Both parties claim title to the lot in controversy from the Blue Rapids Town Company. The sheriff's deed, which is admitted to be regular in form and valid upon its face, was executed on December 26, 1878, in pursuance of an execution sale made to satisfy a judgment obtained by Jane F. Hathaway against the Blue Rapids Town Company. The plaintiffs in error claim title to the lot through a conveyance made by the Blue Rapids Town Company subsequently to the sale and conveyance by the sheriff, and on December 13, 1879. The judgment in favor of Jane F. Hathaway was obtained on March 28, 1877, and after two executions had been issued upon the judgment and returned unsatisfied, a third was issued and levied upon the lot in controversy as the property of the Blue Rapids Town Company. It is admitted that the lot was duly ap-

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praised and offered for sale, and the amended return of the sheriff is that it was sold to Jane F. Hathaway for a sum greater than two-thirds of the appraised value, she being the highest and best bidder therefor. The validity of the judgment and execution and the regularity of the sale and prior proceedings are not questioned, and it is further conceded that immediately prior to the sale and conveyance of the lot, the title to the same was in the Blue Rapids Town Company. The objection to the sheriff's deed is based upon the returns made by the sheriff upon the execution. It seems that W. H. H. Freeman was the attorney of Jane F. Hathaway, and was present at the sale and made a bid upon the property, as he claims, for and in the name of his client. In the return first made by the sheriff it was stated that the lot was sold to Freeman, who refused to pay the amount of his bid, and on the 15th day of November, 1878, the execution was returned unsatisfied. At the next term of court, which convened in the month of December following, Jane F. Hathaway moved the court to require the sheriff to correct his return so as to show that the property was sold to her instead of to her attorney, and that the sheriff be required to accept the sum of \$146.85, which was the amount of the bid in excess of her judgment. This motion was allowed, and the amendment was made by the sheriff, as hereinbefore stated. The plaintiffs in error say that the first return was conclusive, and when filed could not be amended or corrected. This is a mistaken position. The return of the officer upon the execution is only a history of the steps taken by him in obedience to its command. It is the duty of the court to protect its process, and as the return is the evidence of what was done by the officer under the execution, and upon which the rights of the parties and the liability of the officer depend, it is important that the facts therein should be correctly stated; and if they are not, it is the duty of the court upon proper application, to permit the officer to amend his return conformably to the facts. Before the return is finally filed, it may be amended by the officer without leave; but when it has been filed and made a record of the court, it

can only be changed or amended with the permission of the court. The court does not make the amendment nor change the facts, but only allows the return to be made so as to correctly evidence the facts.

The objection is made that the officer resisted the motion to amend his return, and was by the court compelled to make the amendment. What the action of the court was, can only be learned from the record of the proceedings on the motion to amend, and the amended return which was made. From these the most that is shown is, that the motion was made to amend by Jane F. Hathaway, the plaintiff in the action and purchaser of the property, who appeared by her attorney, while the sheriff appeared by his attorney, who was one of the attorneys of record for the Blue Rapids Town Company. The amendment could be made upon the application of the plaintiff or the purchaser of the property, as well as upon the application of the officer himself. For aught that appears, the application may have been made by the plaintiff upon the suggestion or request of the sheriff. At first he may have thought that the bidder must be personally present, and that Freeman, who was the agent and attorney of the plaintiff, could not bid in her name, and accordingly made the return that the lot was struck off to Freeman; or he may have misunderstood the bidder, and after investigation of the facts before the court upon the motion to amend, become satisfied that the bid was made for the plaintiff instead of for Freeman; but be that as it may, it does not appear that there was any compulsion, nor that the court dictated in any manner what should constitute the return. And even if the sheriff at first resisted the application, it will make no difference, as it appears that the return was subsequently amended by him and not by the court, and that it was made after an inquiry into the facts which presumably satisfied him that the bid was made for, and the sale made to, Jane F. Hathaway, as stated in the amended return.

It is also objected that the amendment was made without notice to the Blue Rapids Town Company, or to the plaintiffs

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in error. By some of the courts it is held that the return may be amended as a matter of course, and that no notice is necessary. In *Rickards v. Ladd*, 6 Sawyer, 40, the court, in determining the authority of an officer to amend his return, says:

"Strictly speaking, then, the proceeding is one between the officer and the court. It is *ex parte* in its very nature; and no one has an absolute right to a notice of it. In contemplation of law the amended return is made under the same sanction and responsibility as the mistaken one. In effect it becomes the return of the case, and cannot be questioned collaterally by the parties to the action, or those claiming under them as privies." (*Morris v. Trustee*, 15 Ill. 269; *Dun v. Rodgers*, 43 id. 260; *Wright's Appeal*, 25 Pa. 373; *Kitchen v. Reinsky*, 42 Mo. 427.)

There are cases holding that notice of the application to amend a return is necessary, where a long time has elapsed after the original return has been made, or the term to which the process is returnable has passed and the case has been stricken from the docket, or where a return has been made upon an execution which shows that it is satisfied and the amendment would have the effect of restoring the liability of the defendant. (*Coopwood v. Morgan*, 34 Miss. 368; *Thatcher v. Miller*, 13 Mass. 271; *Hovey v. Wait*, 17 Pick. 197; *O'Connor v. Wilson*, 57 Ill. 226; *Williams v. Doe*, 9 Miss. 559; *Freeman on Executions*, §358.)

It may generally be said that applications to amend returns are addressed to the sound discretion of the court, and are only to be allowed in furtherance of justice. If much time has elapsed since the first return, or if new rights have likely intervened, it is necessary and proper that notice to those interested should be given; but it will be seen that this amendment was made at the succeeding term of court, and within a

few days after the original return was filed. The amendment was made at the same term, but before the confirmation of the sale was made.

1. Sheriff's sale;
amendment
of return;
notice; practice.

The parties are deemed to be in court until the sale is confirmed so that no notice is necessary of a motion to

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confirm the sale; and it would seem that the application to amend the return of the execution sale might be made before the confirmation of the sale without a new or additional notice. In any event, the plaintiffs in error are not entitled to notice. At the time the amendment was made, they had no interest whatever in the proceedings under the execution, or in the property sold. The Blue Rapids Town Company is not complaining of the want of notice, and the plaintiffs in error cannot complain for them. They did not purchase the lot on the faith of the original return, and could not have been misled by it. When they attempted to purchase the property the amended return had been made and filed, and therefore no notice to them of the application to amend was necessary. (*Baker v. Binninger*, 14 N. Y. 270.) We may rest this decision, however, upon another and the broad ground, that the judgment and execution being confessedly valid, the sheriff's deed cannot be attacked, nor the proceedings impeached by strangers, nor by anyone in this collateral action. (Freeman on Executions, §§ 334, 339, 364, 365; Rorer on Judicial Sales, §§ 479, 480, 789, 1059; Herman on Executions, §§ 248, 249, 301, 326, p. 402; *Rounsaville v. Hazen*, 33 Kas. 76; *Dickens v. Crane*, 33 id. 344; *Cross v. Knox*, 32 id. 725; *Pritchard v. Madren*, 31 id. 38.)

The second point urged by the plaintiffs in error is, that the testimony does not support the finding of the court that the land conveyed by the sheriff's deed is the same as that described in the petition. In the sheriff's deed, under which Freeman claims, the land is described as lot eleven on the county road. The same description was given in the petition, but it was further described by metes and bounds. It appears that the Big Blue river runs through the city of Blue Rapids, and that having been dammed there, it affords a water power which has been largely utilized to propel machinery in mills and manufacturing establishments that have been constructed at that place. There was an irregular strip of land lying near to the dam and between what was called the county-road and the river, which was laid out by the town company

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as water-power lots, and designated by number, and as county road lots, among which is the lot in controversy. The plat embracing the water-power lots was regularly made and filed, but no monuments are to be found of the survey then made. The testimony in the record does not show very satisfactorily the identity and boundary of the water-power lots, but we deem it sufficient to sustain the conclusion reached by the court. The plaintiffs in error claim that a certain half-section line was the base line or initial point from which these lots were measured and surveyed, but there is little in the testimony to support this claim. On the other hand, the defendant in error claims that the lots were surveyed and measured from a point near the dam and bridge over the same. It appears that the tract first sold was for an oil mill, and was immediately below the dam, and is claimed to be upon lot thirteen. The adjoining tract, or what is claimed to be lot twelve, was next sold for a gypsum mill. The tract next sold was for a paper mill, and is on what was claimed to be lot ten. Upon each of these lots so sold large and substantial buildings have been erected. It is claimed that lot eleven lies between the gypsum mill and the paper mill. Upon what is called lot eleven, and immediately north of the gypsum mill, there is a water wheel, and it appears that the Blue Rapids Town Company, while it yet owned the ground, entered into an agreement with Price Bros., who owned a foundry and machine shop on the opposite side of the county road, giving them the right to use the water wheel above mentioned, and the machinery connected therewith, and in that agreement the land upon which the wheel was located was described as lot eleven. A witness named Loban, who had resided in Blue Rapids for thirteen years, testified that he was called as an appraiser to appraise the land upon which the execution was levied, and that the land between the gypsum mill and the paper mill was appraised as lot eleven. One D. Fairbanks, an old resident of the city, testified that he was familiar with the water-power lots, and that he was present and assisted in making a survey of them. It does not appear that this was the original survey,

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but it does appear that it was made for the purpose of locating the water-power lots where the oil, gypsum and paper mills were located, and that monuments were then placed at the corner of their premises. Upon inquiry, the witness stated that the ground lying between the mills was understood to be and was called lot eleven. This testimony was objected to as incompetent, and its admission is assigned for error. The court found that there was no way to determine from the recorded plat or from any measurement, exactly where lot eleven is or was, and that there were no monuments on the ground from which its boundaries could be ascertained with any degree of accuracy. In view of this condition of the case,

2. General reputation as evidence to prove boundaries.

and in absence of evidence of a higher and better nature, we think that the testimony was admissible. It will be observed that the boundaries are public ones, which it is generally conceded may, in cases of necessity, be established by hearsay and reputation. In *Boardman v. Lessees of Reed & Ford*, 6 Pet. 328, the supreme court of the United States, in passing upon the admissibility of that class of testimony, stated:

“That boundaries may be proved by hearsay testimony, is a rule well settled, and the necessity and propriety of which is not now questioned. . . . Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made; by the improvement of the country and from other causes they are often destroyed; and it is therefore important in many cases that hearsay and reputation should be received to establish ancient boundaries.”

In *Kinney v. Farnsworth*, 17 Conn. 355, it was decided that—

“Within whatever limits the rule of evidence as to the admissibility of reputation on the questions of boundary is restricted elsewhere, it is well settled in this state that general reputation is admissible for the purpose of showing not only public boundaries, and such as those between towns, societies, parishes, and other public territorial divisions, but also the boundaries of lands of individual proprietors.”

In support of the same view, see also *Harriman v. Brown*,

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8 Leigh, 697; *Ralston v. Miller*, 3 Rand. 44; *Cox v. The State*, 41 Tex. 1; *Conn v. Penn*, 1 Pet. C. C. Rep., 496.

Under these authorities the admission of this testimony was not error. While the testimony upon the identity and boundaries of the lots is weak, we think it must be held sufficient to uphold the judgment of the district court, which will be affirmed.

All the Justices concurring.

H. E. BUSH, as Sheriff of Shawnee County, v. CHARLES COLLINS.

1. **FRAUDULENT SALE; Title of Purchaser; Notice.** Where an insolvent and failing merchant makes a sale of all of his goods and merchandise for the purpose of defrauding his creditors, no one but a purchaser for a valuable consideration actually passed before notice of the fraud can, as against attaching creditors, claim title to the property which has been fraudulently disposed of.
2. **PURCHASER, Protected to What Extent.** Where a party purchases from an insolvent and failing merchant a stock of goods, and the merchant makes such sale with the purpose to defraud his creditors, and the purchaser thereof has no actual or constructive notice of the fraud at the time of his purchase, but subsequently and before the payment of all the consideration of his purchase has actual notice thereof, he can only be protected to the extent of the money actually paid, or the security or property actually appropriated by way of payment before notice. If notice of the fraud is after payment of a part of the purchase-money, the purchaser is only entitled to reimbursement for the money paid or the security or property actually appropriated by the seller as payment. He is not to be regarded as a purchaser for a valuable consideration as to the purchase money not paid.

Error from Wyandotte District Court.

ACTION brought February 21, 1883, by *Charles Collins* against *H. E. Bush*, as sheriff of the county of Shawnee.

35	535
37	344
38	262
39	654
35	535
41	474
42	309
42	311
35	535
46	611
35	535
47	308
35	535
49	29
35	535
56	468

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The petition is in words and figures as follows, (omitting court, title, and exhibit:)

"1. The plaintiff, Charles Collins, complains of the defendant, H. E. Bush, sheriff of Shawnee county, of the state of Kansas, and for cause of action against the defendant says: That the plaintiff is now, and was at all the time hereinafter complained of, a citizen of the state of Kansas; that the defendant is now, and was at all times hereinafter complained of, a citizen of the state of Kansas, and duly elected, qualified and acting sheriff of the county of Shawnee, in said State of Kansas; and in all the matters hereinafter stated and complained of against him, acted in the capacity of sheriff of the county of Shawnee, in the State of Kansas.

"On the 7th day of October, 1882, and for a long time prior thereto, the plaintiff was the owner of, and in the actual possession thereof, of a large and valuable stock of merchandise in the city of Topeka, in the county of Shawnee and state of Kansas, consisting of groceries, clothing, furnishing goods, hats and caps, outfitting store, and other merchandise, of the aggregate value of twenty-five thousand dollars, and which stock of merchandise is more particularly and in detail described, with the separate value of each item thereof opposite thereto, in a certain schedule hereto attached, marked 'Schedule A,' and made a part of this petition.

"On the day last aforesaid, the defendant, H. E. Bush, sheriff of the county of Shawnee, in the state of Kansas, and in his capacity of said sheriff, wrongfully and tortiously seized and took into his possession and from the possession of the plaintiff, and at the county of Shawnee aforesaid, the entire stock of merchandise hereinbefore mentioned, and every item thereof embraced and stated in said schedule A, to his own use.

"On the date aforesaid the plaintiff demanded of and from the defendant the return to him of said entire stock of merchandise and each and every part thereof, and the plaintiff avers and charges the same to be true that although the defendant then and before that time well knew that the plaintiff was the owner thereof, and was actually in the quiet and peaceable possession thereof before the unlawful taking hereinbefore stated, and was lawfully entitled to the possession thereof after the taking of the same aforesaid, the defendant upon said demand and at all times thereafter refused and still refuses to return said stock of merchandise or any part there-

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of, to the damage of plaintiff in the sum of twenty-five thousand dollars, with interest thereon from the 7th day of October, 1882.

"Wherefore, the plaintiff asks judgment against the defendant, H. E. Bush, sheriff of the county of Shawnee, in the state of Kansas, for the sum of twenty-five thousand dollars and interest thereon at 7 per cent. per annum from October 7, 1882, and costs of suit."

On March 23, 1883, the defendant filed the following answer, (omitting court and title:)

"And now comes the defendant, and for answer to the petition of plaintiff, denies each and every allegation in said petition contained.

"2d. And for a second offense, the defendant alleges that at the time of the alleged taking of said goods and chattels in said petition mentioned, the defendant was the sheriff of the county of Shawnee, in the state of Kansas, and that said goods and chattels were the property of A. D. McMillan and Wm. McMillan & Co.; that at that time various and several writs of attachment had been issued from the office of the clerk of the district court of said county at the action of and in suits brought by the McCord & Nave Mercantile Company, a corporation organized under the laws of the state of Missouri, the Gauss-Hunicke Hat Company, a corporation organized under the laws of the state of Missouri, and Isaac Weill, Isadore Weill, and A. Steinaker & Co.; and also in suits and actions brought in said court by others against the said A. D. McMillan & Co., and against the property of said A. D. McMillan & Co., and duly delivered to defendant as such sheriff; and if defendant took the said goods and chattels, he took them as sheriff as aforesaid, and by virtue of said several writs of attachment, as he might and ought rightfully to do; and that if the plaintiff claims said goods and chattels, he claims under a pretended sale from A. D. McMillan & Co.; but that such pretended sale, if any was made, was a fraudulent one and void, and made with the intent to defraud the creditors of the said A. D. McMillan & Co., and especially the plaintiffs in the attachment suits above mentioned. Wherefore, defendant prays judgment."

On April 11, 1883, the plaintiff filed a reply, denying each and every material allegation contained in the answer. On August 4, 1883, upon the application of the plaintiff, the place

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of the trial of the action was changed from the district court of Shawnee county, and by consent of all the parties sent to the district court of Wyandotte county for trial. Trial had at the July Term of court for 1884, before a jury. The jury returned a verdict for the plaintiff, and assessed his damages at \$9,000. The defendant filed his motion for a new trial, which (omitting court and title) is as follows:

"Comes now the defendant, and moves the court here to set aside the verdict herein and grant a new trial, because of—

"1. Error of law occurring at the trial and excepted to by the defendant.

"2. The verdict is not sustained by sufficient evidence, is contrary to the evidence and is contrary to law.

"3. Misconduct of the prevailing party, the plaintiff, where attorney upon the trial of said cause indulged in improper and abusive language respecting the counsel for defendant, commenting upon matters not in evidence, and making statements to the jury respecting the same which are not true.

"4. Error of the court upon the trial in refusing each and every of the special instructions prayed for by the defendant.

"5. Error of the court upon the trial in each and every of the instructions given to the jury.

"6. Misconduct of the jury.

"7. Accident and surprise which ordinary prudence could not have guarded against.

"8. The court erred upon the trial in overruling the objections of the defendant to the introduction of evidence offered by the plaintiff.

"9. The court erred upon the trial in sustaining the objections of the plaintiff to evidence offered by defendant."

This motion was overruled, and judgment entered upon the verdict in favor of the plaintiff and against the defendant for the sum of \$9,000, together with all costs, taxed at \$160.70. The defendant excepted to the rulings and judgment of the court, and brings the case here.

Case & Moss, Rossington, Smith & Dallas, Nathan Cree, W. P. Douthitt, and J. D. McFarland, for plaintiff in error.

J. S. Ensminger, Frank Herald, and Waters & Chase, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The facts in this case, not contradicted, are as follows: A. D. McMillan and William Quigley, under the firm-name of A. D. McMillan & Co., opened a wholesale store in North Topeka, in this state, in August, 1882, for the sale of groceries, boots and shoes, hats and caps, and clothing. They continued in business until October 7, 1882, paying for only a few of the goods they bought, and owing for nearly all of them. On October 7, McMillan, for the purpose of defrauding the creditors of A. D. McMillan & Co., sold all of their goods in lump, without invoice, to Charles Collins, through his agent, William H. Frease, for \$7,500. At the time of purchasing, Frease did not inquire of A. D. McMillan whether the firm owed anything, and asked nothing whatever about their financial condition. At this time A. D. McMillan & Co. were indebted to their creditors for goods purchased, over \$18,000. The stock sold by McMillan to Collins on October 7th was worth about \$12,000, although some of the estimates of the value of the stock at the time of the sale were as high as \$15,000 to \$18,000. Collins is a cattle-dealer, residing in Reno county, in this state, and a man of considerable wealth. At the time of the purchase he had \$20,000 on deposit in one of the banks of his county. On and prior to October 7, William H. Frease was employed by Collins as general manager of a store owned by him at Nickerson, in this state. The store carried a stock of about \$6,000 of general merchandise. On October 6, 1882, Frease received a telegram from A. D. McMillan to come to Topeka. He arrived there at three o'clock on the morning of October 7th, and met McMillan at the Gordon House. After breakfast he went over to North Topeka with McMillan, and bought for Collins all the goods in the store for \$7,500. The bargain was concluded about eleven o'clock A. M., McMillan accepting in payment of the stock the note of Charles Collins, executed by Frease, for \$7,500, due in sixty days. Frease paid \$200 to McMillan on the note. He took possession of the goods

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about noon of October 7th — Saturday — and immediately procured teams, engaged cars, and began to ship the goods out of the store to the depot, to be hauled off, and was so engaged when the attachments of the creditors of A. D. McMillan & Co., to the amount of over \$18,000, were levied upon the stock. There is some contradiction in the evidence as to the value of the goods Collins actually got away with, but Frease testifies that the sugar received and retained by Collins was worth \$260. On Sunday morning, October 8, Collins reached Topeka. Soon after his arrival Frease informed him about the transaction, and also informed him that the creditors of A. D. McMillan & Co. had attached the stock. At this time a large number of the creditors of A. D. McMillan & Co., or their representatives, had arrived at Topeka, and Collins became fully informed of the fraudulent scheme of McMillan & Co. in disposing of their goods to defraud their creditors. After this, Collins hunted up McMillan and tried to get his note executed for the stock. Collins told McMillan "there was going to be a law suit; that the creditors had run attachments on the goods, and that he did not want to have any trouble about it." McMillan insisted to Collins "that the same was fair and square." Collins then proposed to McMillan to pay him a thousand dollars if his note was put in somebody's hands, to be held until this case was decided. McMillan first demanded \$1,500, but finally dropped down to \$1,000, and Collins agreed to give him a little money along from time to time, not exceeding \$1,000. Hiram Raff, then postmaster at Hutchinson, in Reno county, was agreed upon as the party to hold the note, with the understanding between Collins and McMillan that the note should remain in Raff's hands pending this action, and if Collins lost the suit, it was not to be paid. Under this arrangement, the note was turned over to Raff, and he now holds the same. After this Collins paid McMillan from time to time certain sums of money, not amounting, however, to the \$1,000 agreed upon.

As McMillan & Co. sold their stock of goods with the intent to defraud their creditors, if Frease, the agent of Collins,

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had knowledge of such intent, the transaction, not being *bona fide*, must be deemed fraudulent as against the creditors of McMillan & Co. So, also, if Frease, as the agent of Collins, did not have actual knowledge of the intent of McMillan & Co., yet if his situation was such that as a reasonably prudent man he could and would have known of the fraudulent intent, the transaction must also be deemed fraudulent. A vendee cannot blind his eyes to facts which surround him, and protect himself by claiming that he had no actual knowledge of his vendor's fraudulent intent. A knowledge of facts sufficient to put one upon inquiry, is equivalent to actual knowledge of the ultimate fact. (*Kurtz v. Miller*, 26 Kas. 314.) If the circumstances surrounding the purchase by Frease were such as would put a prudent man upon inquiry, which if prosecuted diligently would have disclosed the fraud of McMillan & Co., Collins cannot be deemed a *bona fide* purchaser. (*McDonald v. Gaunt*, 30 Kas. 693.)

Again, the rights of a vendee, innocent of the fraudulent intent of the vendor, are only protected where such vendee gives a valuable consideration. If there be no valuable consideration, the mere acceptance of the transfer by the vendee does not make the transaction a *bona fide* one. Where a valuable consideration is paid in good faith for a transfer from

the vendor, who acts with fraudulent intent, the interest of the creditor is superseded. The innocent purchaser, in such a case, having parted with value upon the faith of the vendor's possession and ownership of the property, acquires not only the legal title, but an equity which is paramount to that of the creditors of the failing and fraudulent debtor. So, in this case, if it be conceded that the transaction between Collins and McMillan was in good faith, so far as Collins is concerned, yet if there was no consideration, the interest of the creditors is paramount to any claim of Collins. More than this, the protection to which a *bona fide* purchaser without notice is entitled, extends only to money which has been actually paid, or to securities or property which have been actually appropriated by way of

1. Fraudulent sale; title of purchaser; notice.

Bush, Sheriff, v. Collins.

payment before notice, and notice before actual payment of all the purchase-money is binding as to the consideration not paid, in the same manner as notice had before the contract. In other words, to entitle a person to the character of a *bona fide* purchaser without notice, he must have acquired the legal title and have actually paid the purchase-money, or parted with something of value by way of payment before receiving notice. And even if notice is only after a payment of a part of the purchase-money, the purchaser is only entitled to reimbursement for the money paid. Before A. D. McMillan or McMillan & Co. had ever parted with the note executed by the agent of Collins, Collins had full notice of their fraud. The only money paid by Collins or his agent before the attachments were levied upon the goods in controversy, was the sum of \$200. Collins has received for this \$260 worth of goods, which he has converted to his own use. He therefore has been reimbursed for all money paid by him upon the purchase. All the moneys paid subsequently upon the note were paid by Collins with full knowledge of the fraud, and Collins cannot be heard to say that he made these payments in ignorance of the rights of the creditors. The note executed for the purchase of the goods was placed in the hands of Raff, and therefore could not be sold or negotiated to the injury or prejudice of Collins. Indeed, it does not clearly appear that the note was payable to the order of McMillan & Co., or to bearer. It may have been a non-negotiable note; but in any event, it never passed out of the hands of McMillan & Co. to any *bona fide* holder, and Collins never paid anything upon the note, except \$200, until after the note had been deposited with Raff. These sums, whatever they were, were paid by Collins at his own peril, with full knowledge of the fraud of his vendors. As Collins ascertained, soon after his arrival at Topeka, full knowledge of the fraudulent purpose of McMillan & Co., he could, if an innocent purchaser, have immediately brought an action to rescind the sale and cancel the note, as the note was then in the hands of McMillan. Even after Collins had entered into

2. Purchaser,
protected to
what extent.

Opinion of the Court.

an agreement to pay McMillan \$1,000 and to put the note in Raff's hands to be held until the determination of this action, he could have protected himself from the payment of any of this money by an action against McMillan & Co., if the promise to pay \$1,000 was obtained by the fraudulent statements of McMillan that the note had already been negotiated.

Among other instructions prayed for by defendant below, was one to the effect that if Collins received notice that the sale of McMillan & Co. was fraudulent as to the creditors, he would be protected only to the amount and extent of the payment made before receiving such notice, and if he had taken goods from the stock so purchased exceeding in value the amount he had paid, and converted the same to his own use, he could not recover. This instruction was refused, and the court nowhere in its charge informed the jury that Collins could not be a *bona fide* purchaser unless he paid the purchase-money before he had notice of the fraud of McMillan & Co. If his note had been negotiable and had passed out of the hands of McMillan & Co. before notice of the fraud to Collins, the result would have been the same as though Collins had actually paid the money at the time of his purchase of the stock of goods; but the consideration in money, note, or otherwise, must in all cases like this, to protect the purchaser against attaching creditors, be actually passed before notice. The judgment rendered for Collins was to the amount of \$9,000. As the purpose of McMillan & Co. was to defraud their creditors, and as Collins did not pay and has not yet paid all the purchase-money, even if he bought without notice of the fraudulent intent on the part of McMillan & Co. he is not a purchaser for a valuable consideration, as to the purchase-money not paid, and is not entitled as against the creditors of McMillan & Co., to the goods seized by the sheriff upon the attachments, and the judgment is therefore wholly unsupported by the evidence. The trial court refused to inform the jury of the effect of the failure of Collins to pay the purchase-money, and the judgment must be set aside.

Upon the argument, it was insisted by the counsel of Collins

Bush, Sheriff, v. Collins.

that the judgment should stand, because Collins was liable to certain creditors of McMillan & Co. under proceedings in garnishment which had been instituted against him. It affirmatively appears from the record that Collins had notice of the fraud of McMillan & Co. before the notices of garnishment were served upon him. In any event, he is not liable as a garnishee if he is not indebted to McMillan & Co. On account of the fraud of McMillan & Co., Collins is not liable upon the note in the hands of Raff. The interest of the creditors who attached the goods in controversy is paramount to any claim of Collins, is also paramount to any claim of McMillan & Co., or of creditors who have simply garnished Collins as the debtor of McMillan & Co. The failure in the title to the goods purchased by Collins from McMillan & Co. exonerates him from paying the purchase-price. (*Dixon v. Hill*, 5 Mich. 404; *Kerr on Fraud*, 318; *Bump on Fraudulent Conveyances*, 2d ed., 194-201.)

As an apology for the failure of the trial court to properly direct the jury, and for the judgment in this case, counsel of Collins insist that the subsequent arrangement entered into between Collins and McMillan as to the disposition of the note executed by Collins, was not set forth in the answer. This was not necessary. Collins alleged in his petition that he was the owner and in possession of a stock of goods and merchandise, which the sheriff of Shawnee county had seized and taken possession of in his official capacity, and demanded damages therefor in the sum of \$25,000. The sheriff filed an answer denying the allegations of the petition, and setting up that the goods and merchandise seized by him were the property of McMillan & Co., and that upon several writs of attachment, (giving the names of the parties thereto,) he seized and took possession of the goods and merchandise in dispute, and further alleged in his answer that the sale from McMillan & Co. to Collins was fraudulent and void, and made with the intent to defraud the creditors of McMillan & Co., and especially the creditors named in the attachment proceedings. In support of this answer, the sheriff had a right to prove that

Weyand v. Stover, Treas.

Collins was not a purchaser for a valuable consideration. He had the right to show that the note which Collins had executed was non-negotiable; that even if negotiable, it had never passed out of the hands of McMillan & Co. to a *bona fide* holder. No one but a purchaser for a valuable consideration can claim title to property which has been fraudulently disposed of against the action of attaching creditors. The arrangement entered into between Collins and McMillan & Co. on October 9, 1882, fixed conclusively the transfer of the stock of goods to Collins without consideration, excepting as to the \$200 already paid, and Collins has received and converted to his own use goods in excess of that amount. This arrangement was disclosed by Collins upon his own examination.

A great many other questions are presented and discussed, but in view of the undisputed fact that the sale of McMillan & Co. was to defraud their creditors, and that Collins was not a purchaser for a valuable consideration as to the purchase-money not paid, it is unnecessary to comment upon these matters.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

VALENTINE, J., concurring.

DANIEL WEYAND, *et al.*, v. S. G. STOVER, *as Treasurer of Republic county, et al.*

1. **TITLE TO ACT; Valid Statute.** The title to an act of the legislature reads as follows: "An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings in said counties." The "subject" of this act is the creation and use of a fund to build county buildings, and the body of the act expressly applies to the three counties of Ottawa, Washington and Republic. *Held*, That the act contains only one subject, which is sufficiently expressed in its title, and is therefore

35	545
36	40
37	380
38	380
39	545
40	545
41	204
42	634
43	545
44	545
45	545
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48	545
49	545
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not in conflict with that provision of § 16, article 2 of the constitution which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

2. **READING BILLS; Emergency; Journal.** The bill was introduced in the senate and read a first and a second time on the same day, and the senate journal does not show whether a case of emergency existed, or not. *Held*, That, although it is necessary under § 15, article 2 of the constitution that "every bill shall be read on three separate days in each house, unless in case of emergency," yet that each house is the exclusive judge as to when a case of emergency arises or exists; and it is not necessary, in order that the reading of the bill shall be considered valid, that the emergency shall be stated upon the journal.
3. ——— **Discrepancies; Valid Act.** From the legislative journals it appears that there were several discrepancies or irregularities in the description of the bill and the title to the bill; but, *held*, that the same do not render the act as subsequently passed by the legislature void.
4. ——— **Presumption.** Nothing appearing showing that the bill was not read section by section on its final passage, as required by § 15, article 2 of the constitution, *held*, that presumptively it was so read.
5. **BILL, Read Three Times.** Where the house journal shows expressly and affirmatively that the bill was placed upon its third reading, and that afterward it "was read the third time," *held*, that it is sufficiently shown that the bill was read three times in the house.
6. **ENROLLED STATUTE; Presumption.** The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively and beyond all doubt, that the act was not passed regularly and legally.

Error from Republic District Court.

ACTION brought by *Weyand* and others, against *Stover*, as treasurer of Republic county, and others, to enjoin defendants from collecting certain taxes. The defendants demurred to plaintiffs' petition on the ground that it does not state facts sufficient to constitute a cause of action. At the April Term, 1884, the court sustained the demurrer, and rendered judgment for costs against the plaintiffs. They bring the case here. Other facts appear in the opinion.

Statement of the Case.

Chapter 80 of the Session Laws of 1883 has the following title:

"An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings in said counties." (Laws of 1883, p. 128.)

The act was approved February 27, 1883, and purports to have taken effect February 28, 1883. Before its passage it was senate bill No. 226. The printed journals of the two houses show as follows:

On Friday, February 9, 1883, the following proceedings were had in the senate:

"By consent, Senator Patchin introduced bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county buildings, and to provide for the building of the same. The bill was read the first time. On motion of Senator Patchin, the rules were suspended, senate bill No. 226 was read the second time, and referred to the committee on judiciary." (Senate Journal, 367.)

On Thursday, February 15, 1883, the chairman of the committee on judiciary made the following report:

"MR. PRESIDENT: Your committee on judiciary, to whom was referred senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county buildings, and to provide for the building of the same, have had the same under consideration, and instruct me to report the bill back to the senate with the recommendation that it be passed.

S. O. THACHER, *Chairman.*"

(Senate Journal, 426.)

On Wednesday, February 21, 1883, the following proceedings were had in the senate:

"Senator Patchin moved that the rules be suspended, and senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same, be considered

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engrossed, and placed on the calendar for third reading, subject to amendment and debate, which motion prevailed." (Senate Journal, 543.)

On Thursday, February 22, 1883, the following proceedings were had in the senate:

"Senator Patchin moved that the rules be suspended, and that senate bill No. 226, which was on the calendar for third reading, subject to amendment and debate, be read the third time now, which motion prevailed.

"Senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same, was read the third time, and being subject to amendment, Senator Rector moved to amend the bill so the provisions thereof shall apply to Washington county, which motion prevailed.

"Senator Case moved to amend the bill so its provisions shall also apply to Jewell county, which motion prevailed.

"Senator Brown moved to amend the bill by adding Republic county to the counties named in the bill, which motion prevailed.

"The question then being, Shall the bill pass? The roll was called, with the following result: Yeas, 22; nays, 0."

The names of the senators voting, and those absent, are given. (Senate Journal, 576.)

Also, on the same day, the chairman of the committee on engrossed bills made the following report:

"MR. PRESIDENT: Your committee on engrossed bills, to whom was referred senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings, and to provide for the building of the same, have examined the same, and instruct me to report the bill back to the senate correctly re-engrossed.

A. R. GREENE, *Chairman.*"

(Senate Journal, 589.)

Also, on the same day, the secretary of the senate made the following report to the house:

"MR. SPEAKER: I am directed to inform the house that the senate has passed the following bills: ". . . Senate bill

Statement of the Case.

No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same.

HENRY BRANDLEY, *Secretary.*"

(House Journal, 732, 733.)

On Friday, February 23, 1883, the following proceedings were had in the house:

"On motion of Mr. Orner, senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same, was placed on third reading, subject to amendment and debate." (House Journal, 743.)

On Saturday, February 24, 1883, the following proceedings were had in the house:

"Senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same, was read the third time, and the question being, Shall the bill pass? the roll was called, with the following result: Whole number of votes cast, 92; constitutional majority, 63. Yeas, 91; nays, 1; absent or not voting, 33."

The names of the members voting for and against, and those absent, are given. (House Journal, 787.)

On Monday, February 26, 1883, the chief clerk of the house made the following report to the senate:

"MR. PRESIDENT: I am directed to inform the senate that the house has amended senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same, by striking out of second line of section 1 the word 'Jewell,' and respectfully desires your concurrence therein.

H. L. MILLARD, *Chief Clerk.*"

(Senate Journal, 642.)

And on the same day, the following proceedings were had in the senate:

"Senator Patchin called up house message relating to senate bill No. 226, An act authorizing the board of county com-

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missioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings, and to provide for the building of the same.

"The house having amended the bill by striking therefrom Jewell county, Senator Patchin moved that the senate concur in house amendment.

"On which the roll was called, with the following result: Yeas, 22; nays, 1."

The names of the senators voting for and against, and those absent, are given. (Senate Journal, 645.)

On the same day, the secretary of the senate made the following report to the house:

"MR. SPEAKER: The senate has also concurred in house amendment to senate bill No. 226, An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county bridges, and to provide for the building of the same.

HENRY BRANDLEY, *Secretary.*"
(House Journal, 803.)

The bill was enrolled and duly signed by the officers of the respective houses, and signed and approved by the governor, and is now on file in the office of the secretary of state as a duly-enrolled statute, and is duly published in the Session Laws of 1883, as chapter 80, and on pages 128 and 129.

A. D. Wilson, F. W. Sturges, and A. B. Wilder, for plaintiff in error.

T. M. Noble, J. G. Lowe, and B. R. Hogin, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Daniel Weyand and others in the district court of Republic county, to enjoin the defendant, S. G. Stover, treasurer of Republic county, and others, from collecting certain taxes because of their supposed invalidity. A demurrer to the plaintiffs' petition was interposed by the defendants, upon the ground that the petition did not state facts sufficient to constitute a cause

Opinion of the Court.

of action. This demurrer was sustained by the district court. The plaintiffs bring the case to this court.

The taxes sought to be enjoined in this case depend for their validity upon chapter 80 of the Laws of 1883. If that chapter is valid as applied to Republic county, then the taxes are valid; but if that chapter is void as applied to that county, then the taxes are void; and the question of the validity or invalidity of that chapter is the only question involved in the case. The plaintiffs claim that it is void for several reasons. They claim: First, that the subject of the act is not clearly expressed in its title, within the meaning of § 16, article 2 of the constitution; second, that the act contains more than one subject, in violation of said § 16, article 2 of the constitution; third, that the act was not legally passed.

The title to the act reads as follows:

“An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings in said counties.”

Republic county is expressly named in the body of the act, and the act expressly applies to Republic county. The “subject” of the act is the creation and use of a fund to build county buildings, and the act expressly applies to the three counties of Ottawa, Washington, and Republic. This sufficiently appears by the body of the act and also by the title thereto having reference to the body of the act.

1. Title to act;
valid statute.

This is only one “subject,” and it sufficiently appears in the title to the act. We do not think that the first two grounds for claiming that the act is invalid, are tenable. Questions with regard to the titles to acts have been elaborately discussed by this court in many prior cases. (*The State v. Barrett*, 27 Kas. 213, and cases cited on page 218; *Martin v. Borgman*, 21 id. 672; *Board of Education v. The State*, 26 id. 44.)

The plaintiffs also claim that the act was not legally passed. The act was senate bill No. 226, and was introduced in the senate on February 9, 1883, and was read a first and a second

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time on that day, and referred to the committee on judiciary. The plaintiffs claim that this reading of the bill twice on the same day, without its being shown on the journals or elsewhere that a case of emergency existed, and what that emergency was, is in violation of § 15, article 2 of the constitution, which requires that "every bill shall be read on three *separate* days in each house, unless in case of emergency." Now we think that each house of the legislature is the exclusive judge as to when a case of emergency arises or exists, within the meaning of the constitution; and it is not necessary, in order that the reading of the bill shall be considered valid, that the emergency shall be stated upon the journal.

2. Reading bills; emergency.

The title to the bill when the same was introduced in the senate, was, as shown by the senate journal, as follows:

"An act authorizing the board of county commissioners of Ottawa county to provide a fund and appropriate the same for the purpose of building county buildings, and to provide for the building of the same."

In many of the subsequent proceedings the title to the bill is not stated in the journals in these words. In some places where the word "buildings" is used, the word "bridges" is substituted. The journals also show that before the bill passed the senate, the counties of Washington, Jewell and Republic were added to the bill, and the title was so amended that when the bill was engrossed the title read as follows:

"An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings, and to provide for the building of the same."

Several times afterward, however, the word "bridges" appears in the place of the word "buildings." It appears, however, from the legislative journals, that the last act that was done by either house, was the act of the senate in concurring in the house amendment to the bill, and in that place the bill is described as—

"Senate bill No. 226, An act authorizing the board of county

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commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county *buildings*, and to provide for the building of the same."

It is clear from the legislative journals that there was no attempt made to describe the bill or the title thereto literally and with exact precision in the journals, but only an attempt to describe the substance of the bill or the title. In several instances the literal terms of the title were not used, and in a few instances the word "bridges" was substituted where the word "buildings" should have been used. We do not think that these discrepancies or irregularities render the act void. In all probability the bill itself was right. The title to a bill is the last thing agreed to in either house. We shall have more to say hereafter with regard to this and other questions.

It is further claimed by the plaintiffs in error that the act is void for the reason that the bill was not read section by section on its final passage, as required by § 15, article 2 of the constitution. Presumptively, it was so read, and there is nothing showing the contrary.

It is further claimed that the bill was not read three times in the house, but only once. Now the house journal shows expressly and affirmatively that the bill was placed upon its third reading in the house, and that afterward it "was read the third time" in the house. Now it could not have been read the third time in the house unless it had been read a first and a second time; and there is nothing anywhere showing that it was not read a first or a second time.

Irregularities in the passage of bills have been elaborately discussed in several cases in this court, and we would refer to those cases: *Division of Howard Co.*, 15 Kas. 194; *Comm'rs of Leavenworth Co. v. Higginbotham*, 17 id. 62; *Prohibitory-Amendment Cases*, 24 id. 700; *The State v. Francis*, 26 id. 724; *In re Vanderberg*, 28 id. 243.

City of Topeka v. Myers.

In the case of *The State v. Francis*, 26 Kas. 731, the following language is used:

"The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity unless the journals of the legislature show clearly, conclusively and beyond all doubt, that the act was not passed regularly and legally. . . . If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid."

This language is cited with approval in the case of *In re Vanderberg*, 28 Kas. 254; and we think it fairly states the law.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE CITY OF TOPEKA v. E. D. MYERS.

Motion for Rehearing.

PROSECUTION for a violation of a certain prohibitory liquor ordinance of *The City of Topeka*. From a conviction at the April Term, 1884, of the district court of Shawnee county, the defendant *Myers* appealed. The supreme court reversed the case on account of the misconduct of the prosecuting attorney in using the following words in addressing the jury: "If the defendant is not guilty, why did he not take the stand? He could have easily proven that he did not keep the place." (*City of Topeka v. Myers*, 34 Kas. 501.) *The City* filed a motion for a rehearing, which was decided at the July, 1885, session of the court.

Per Curiam: The evidence produced upon the motion for a rehearing is painfully conflicting as to what actually occurred upon the trial in the court below with respect to the conduct of the counsel for appellee; but it is not necessary to determine what is proved or disproved as to those matters. The only question before us is, whether the bill of exceptions embraced in the record has been changed since it was allowed and signed by the district court. The evidence does not establish that any change therein has been made. Under these circumstances, the motion for a rehearing must be overruled.

SAMANTHA V. DUDLEY v. GEORGE T. GILMORE,
as County Clerk of Shawnee County, et al.

ACTION brought by *Dudley* to enjoin the issuance of a certain tax deed. Trial by the court, at the January Term, 1885, of the district court of Shawnee county, and judgment for defendants. Plaintiff brings the case here. The opinion herein, filed at the July, 1885, session of the court, contains a sufficient statement of the facts.

W. P. Douthitt, and *C. M. Foster*, for plaintiff in error.

J. G. Slonecker, and *B. R. Wheeler*, for defendants in error.

Per Curiam: This action was brought by the plaintiff to enjoin the issuance of a tax deed to the defendant, Mrs. A. H. Sawyer. In the year 1871, the land claimed by the plaintiff was subject to taxation, and she paid the taxes thereon. In May, 1872, the land was wrongfully sold by the county treasurer of Shawnee county, for the taxes of 1871, to Walter B. Beebe, and a certificate of sale issued to him. Beebe paid the taxes on the land for the years 1872, 1873, and 1874, and had

Dudley v. Gilmore, County Clerk.

the same indorsed on his certificate. In May, 1875, a deed was issued by the county clerk to Beebe on his certificate of sale issued in May, 1872. Afterward, in May, 1878, the board of county commissioners discovered that the sale of the land in May, 1872, was invalid, and therefore by order set aside the deed and caused the money paid therefor, together with the subsequent taxes, charges and interest, to be refunded to Beebe. In 1878, the county clerk again assessed the land for taxes for the years 1872, 1873, and 1874, and placed the same on the tax-roll. The regular tax for 1878 was paid. In September, 1879, the county treasurer sold the land for the taxes of 1872, 1873, and 1874, and issued tax certificates to the purchaser of the same. These certificates are held by Mrs. A. H. Sawyer.

The payment by Beebe of the taxes of 1872, 1873 and 1874 was upon a mistake of fact, and upon an invalid sale, and therefore they were properly refunded to him, under the statute. (Sec. 146, Comp. Laws, p. 968.) Plaintiff admits that she is the owner of the land; that it was subject to taxation for the years 1872, 1873, and 1874; that it was properly assessed for those years; that she has not paid any part of the taxes, and does not offer to pay the same or any part thereof. The action of injunction is equitable, and the principles of equity will control it. Under the admitted facts, it cannot be said that plaintiff has presented any equitable cause for the interference of the court in her behalf. (*City of Lawrence v. Killam*, 11 Kas. 499; *Challiss v. Comm'rs of Atchison Co.*, 15 id. 49; *Haxton v. Harris*, 19 id. 511; *Knox v. Dunn*, 22 id. 683; *Harris v. Drought*, 24 id. 524; *Belz v. Bird*, 31 id. 139.)

The judgment of the district court will be affirmed.

THE KANSAS CITY BRIDGE AND IRON COMPANY V. THE
BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE
COUNTY.

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36	440
35	557
161	566
35	557
177	157

1. **BRIDGE, Appropriation for; Authority of County Board.** The board of county commissioners of Wyandotte county appropriated \$980 to assist in the building of the Riverview bridge—a bridge across the Kansas river between the cities of Wyandotte and Kansas City, in this state, and connecting two public thoroughfares of the county. *Held*, That the board has the authority to make the contract and pay therefor according to its terms, although the contract only provided for the building or finishing of a portion of the bridge, if, with the assistance thus rendered by the board, the bridge becomes a completed structure fit for use.
2. **NOTICE—Substantial Compliance with Statute.** A notice published by the board of county commissioners in the official paper of their county, of their intention to appropriate money to build a bridge, thirty days prior to the time fixed for the regular meeting of the board, specifying the place where such bridge is proposed to be built, and the estimated cost thereof, is a substantial compliance with the provisions of § 2, ch. 64, Laws of 1876—§ 398, ch. 25, Comp. Laws of 1879.
3. **BOND OF CONTRACTOR, When Not Invalidated.** Where the person to whom a contract is awarded for the building of a bridge, under the terms of the act providing for building and repairing bridges in counties having twenty thousand inhabitants or more, at the time of the execution of the contract, gives a bond with good and sufficient sureties, payable to the county, and recites thereafter “and the state of Kansas,” and such bond does not upon its face show that it is “for the benefit of the bridge fund,” *held*, that such alleged defects cannot vitiate or invalidate the bond so as to defeat the payment for the bridge after its construction and acceptance according to the terms of the contract.

Error from Wyandotte District Court.

THE facts in this case are substantially as follows: On January 8, 1884, R. W. Hilliker, mayor of Kansas City, in this state, and seventy-six other residents and tax-payers of Wyandotte county, filed a petition with the board of county commissioners of that county, asking them to appropriate \$1,000 to assist in building a bridge across the Kansas river,

Kansas City Bridge & Iron Co. v. Comm'rs of Wyandotte Co.

between the cities of Wyandotte and Kansas City, in this state, the bridge to be known as the Riverview bridge. On the same day the petition was referred by the board to the county attorney for an opinion thereon. On January 10, 1884, the petition, with the opinion of the county attorney advising the board that it had the power to grant the appropriation asked for, was returned to the board, and thereupon the board made the following order:

"That the intention of the board to appropriate, at its next regular meeting in April, 1884, the sum of \$1,000 to build a bridge to connect with the west end of the bridge now in course of construction between Wyandotte and Kansas City, Kansas, be advertised as required by law."

On April 11, 1884, the board considered the matter of building a bridge to connect with the bridge then in the process of construction across the Kansas river between Wyandotte and Kansas City, and known as the Riverview bridge, and made the following order:

"It appearing that the intention of the board to appropriate, at its April meeting, the sum of \$1,000 for the purpose of building said bridge, has been advertised in all respects according to law, and the county attorney having heretofore filed a written opinion in the matter, which opinion sets forth that the county commissioners have the power to build the bridge, if, in the opinion of the board, the bridge will be of benefit to the county; and plans and specifications of the bridge having been prepared and filed in the office of the county clerk, together with an estimate of the cost thereof, and the board believing that the bridge will be of great public benefit and utility to Wyandotte county, and especially to the cities about the mouth of the Kansas river, therefore, on motion, it is ordered that the sum of \$1,000 be and the same is hereby appropriated for the purpose of building said bridge; and it is also ordered that said bridge be built at as early a date as is practicable, and that the bids for building said bridge according to the plans and specifications now on file in the office of the county clerk, will be received by the board of county commissioners of Wyandotte county, Kansas, on Monday, May 12, 1884, and the county clerk is hereby authorized and directed to advertise in the official paper of the county in accordance herewith."

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On May 13th, the board, after finding that the notice of the time of letting the contract had been duly advertised according to law, considered three separate bids tendered, and found that the bid of the Kansas City Bridge and Iron Company was the lowest and best. Thereupon, the contract was awarded to that company, and the county attorney was ordered to draw up a written contract in accordance therewith. The company was also ordered to and did give a bond in the sum of \$2,000, conditioned for the faithful performance of the contract. On May 16, 1884, the board entered into a written contract with the Kansas City Bridge and Iron Company, for the construction of a bridge at the east approach of the Riverview bridge, then in the process of erection across the Kansas river between the city of Wyandotte and the city of Kansas, in accordance with the plans and specifications attached to the contract, the consideration for the construction of the bridge to be \$980, the work to be done under the direction and supervision of J. H. Lasley, county surveyor of Wyandotte county, and not to be accepted until the said J. H. Lasley had filed with the board a certificate that the bridge was completed to his satisfaction. The Bridge and Iron Company performed its contract according to the terms thereof, and thereupon presented its demand for payment, properly verified and filed in the office of the county clerk. This officer certified it to the county auditor. The county auditor returned the claim to the board with his report thereon, recommending its disallowance, because the structure was not a bridge. The board disallowed the claim. On October 31, 1884, the company appealed from the decision of the board of county commissioners of Wyandotte county. On January 17, 1885, the cause was heard in the district court of that county before the court, a jury being waived. Judgment was given for the board of county commissioners and against the Kansas City Bridge and Iron Company for costs. A motion for a new trial was made and overruled. The company excepted to the rulings and judgment rendered, and brings the case here.

Kansas City Bridge & Iron Co. v. Comm'rs of Wyandotte Co.

Pratt, Brumback & Ferry, for plaintiff in error.

James S. Gibson, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: In the district court, this cause came up on appeal from the board of county commissioners of Wyandotte county in disallowing the claim of the Kansas City Bridge and Iron Company for the sum of \$980 expended upon the Riverview bridge—a bridge across the Kansas river between the cities of Wyandotte and Kansas City, in this state. The Riverview bridge connects the two public thoroughfares in Wyandotte county—Sixth street, in Kansas City, on the east, and a county road on the west. The learned judge who tried this case decided against the allowance of the claim, for the following reasons: First, that as the Kansas City Bridge and Iron Company is a Missouri corporation, it had no power to enter into a written contract to construct a bridge in this state; second, that as the Riverview bridge connects the two cities of Wyandotte and Kansas City, the authority to build the bridge did not reside in the board of county commissioners of Wyandotte county, but solely in the cities of Wyandotte and Kansas City; third, that the board of county commissioners did not publish as required by law, notice of the intention to build the bridge; therefore that the order of the board making the appropriation for the bridge is void, and that the contract subsequently made is also void. That a corporation created in a foreign state may transact its business in this state, if not repugnant to or prejudicial to our laws, is too well settled to need comment. (*Land Grant Rly. Co. v. Comm'rs of Coffey Co.*, 6 Kas. 245; *O'Brien v. Wetherell*, 14 id. 616.)

“A corporation is clothed everywhere with the character given by its charter, and the capacity of corporations to make contracts beyond the states of their creation and the exercise of that capacity, is supported by uniform, universal and long-continued practice.” (*A. T. & S. F. Rld. Co. v. Fletcher*, ante, p. 236; *Bank of Augusta v. Earl*, 13 Pet. 519.)

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There is no statute in Kansas forbidding the Kansas City Bridge and Iron Company from doing business within this state, or imposing any restriction on the exercise of its power. Within the authority of the *Comm'rs of Wyandotte Co. v. City of Wyandotte*, 29 Kas. 431, the right of the county to build the bridge in controversy is fully justified, under the circumstances of this case. (See also *Comp. Laws of 1879*, ch. 16, § 23; *id.* ch. 107, §§ 83, 84.)

Although the county built but a portion of the bridge, it is a free and public one, and connects two public thoroughfares of the county. (*The State v. Lawrence Bridge Co.*, 22 Kas. 438; *Goodhill v. Town of Beloit*, 21 Wis. 637; *Williams v. Inhabitants of Cummington*, 18 Pick. 312.)

The statute requiring notice of the intention to build the bridge before an appropriation is made therefor, reads as follows:

"It shall be unlawful for any board of county commissioners to make an appropriation for building any bridge, unless notice of the intention to build such bridge has first been published in the official paper of the county at least thirty days prior to the time fixed for a regular meeting of the board, which notice shall specify the place where such bridge is proposed to be built, and the estimated cost of the same, and no appropriation for building any bridge shall be made except at a regular meeting of the board." (*Laws of 1876*, ch. 64, § 2; *Comp. Laws of 1879*, ch. 25, § 396.)

The publication was for the required time, as provided by the statute, and therein gave notice of the intention of the board of county commissioners to appropriate, at a regular meeting of the board in the following April, \$1,000 to build a bridge to connect with the west end of the bridge then in construction between Wyandotte and Kansas City.

We think the notice was in substantial compliance with the statute, and the objection made hypercritical. The notice of the intention of the board of county commissioners to appropriate money to build the bridge in question was in substance a notice of the intention of the

1. Bridge, appropriation for; authority of county board.

2. Notice; substantial compliance with statute.

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board of county commissioners to build the bridge, and such notice served all the purposes the statute was intended to accomplish. The record, however, contains the stipulation that all objections to the regularity of the proceedings leading up to the construction of the bridge were waived at the trial upon the appeal.

In addition to the reasons given by the trial court for refusing the claim of the bridge company, counsel for the board of county commissioners insists that as the work for which the claim of the company is presented is for the building of the eastern span of the Riverview bridge, and not for a completed structure, the board has no authority to make the contract or pay for the work done; and second, that no sufficient bond was executed, as provided for by § 23, ch. 16, Comp. Laws of 1879. The statute provides that when the expense of building a bridge exceeds \$2,000, no appropriation shall be made out of the county treasury until the question has been submitted to the people of the county at some general election, whether the county commissioners shall make an appropriation therefor. This provision in the statute is to limit the power of the county board in making appropriations for the building of bridges. (Comp. Laws of 1879; ch. 16, § 30.) If the expense is less than \$2,000, the appropriation may be made without the vote of a majority of the electors, if notice of the intention to build the bridge is published as required by law. In this case, the contract for work to be expended on the bridge was limited to \$980. As we understand the record, when the portion of the bridge built under the order of the county commissioners was completed, the whole structure was completed, and as completed, the bridge connected two public thoroughfares of the county. We do not think the statute forbids private parties or corporations from assisting the county in constructing a bridge, and thereby decreasing the expense of building the same. If all the parts of a county bridge are built by private parties or by a corporation, except the approach or a single span, and the county commissioners by building such approach

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or span can obtain for the county a complete structure, that is, a whole bridge fit for use, there is nothing in the statute to prevent the county commissioners from accepting and completing such a structure or bridge. Of course a county board could not build a single span, costing \$2,000 or less, under the guise of a bridge, and when the span is completed, build another span, and in this way evade the statute by building a bridge by piecemeal, costing in the aggregate over \$2,000 but the different parts thereof costing less than \$2,000. In this case, while the whole structure cost more than \$2,000, the portion built by the county cost less than \$2,000, and the county did not intend to build the bridge by piecemeal, so as to expend more than \$2,000, but accepted a bridge about completed by adding or building thereto a span or approach. There was no evasion of the statute, and the power exercised was within the authority conferred. Although the county commissioners built only a part of the bridge, the bridge is a public one and the control thereof is in the public. (*Bell v. Foutch*, 21 Iowa, 119; *Yant v. Brooks*, 19 id. 87; *Barrett v. Brooks*, 21 id. 145.) The statute provides that at the time of the execution of a contract for the building of a bridge,

3. Bond of contractor, when not invalidated.

the person or persons to whom the contract is awarded shall execute a bond, with sufficient sureties, payable to the county for the benefit of the bridge fund, in such sum as the board shall direct, conditioned for the faithful performance of the contract. The bond actually executed is payable to Wyandotte county, and thereafter recites "and state of Kansas." "And" may be construed as "in;" but even if this were not so, the word "and" may be rejected as surplusage, and then the bond is payable to the county of Wyandotte only. The failure to state upon the face of the bond that the same is payable for the benefit of the bridge fund, does not vitiate it or render it invalid. The objection to the language of the bond after the bridge has been completed and accepted in accordance with the contract, is a novel way to escape the payment of a just claim.

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The judgment of the district court will be reversed, and the cause remanded with direction for judgment to be entered in favor of the Kansas City Bridge and Iron Company.

All the Justices concurring.

35	564
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58	308

THE FIRST NATIONAL BANK OF FORT SCOTT V. C. F. DRAKE.

NATIONAL BANK — *Powers Vested in Directors as a Board.* The only powers conferred by statute upon the directors of a national bank are vested in them as a board, and when acting as a unit, and therefore the assent of a majority of the individual members of the board acting separately and singly is not the assent of the bank, and is not binding upon it.

Error from Bourbon District Court.

ACTION brought April 16, 1881, by *The First National Bank of Fort Scott, Kansas*, against *C. F. Drake*, to recover for alleged violations by Drake of his trust as a cashier and president of the bank. The petition alleged that from May 5, 1877, until September 28, 1880, Drake was the largest stockholder of the bank and a director thereof, and that upon May 5, 1877, he was elected as its cashier, and held that office continuously and acted as such up to July 7, 1880, when he was elected president of the bank, and held the office of president continuously and acted as such up to September 28, 1880, and that during all this time he was the general manager and custodian of the property, business, money, rights and credits of the bank. The charges alleged against him in the petition in brief are, first, that he paid to himself \$2,203.97, as interest on demand certificates of deposit issued to himself while cashier, in violation of the rules and by-laws of the bank; second, that he paid to himself \$3,165.50 salary, contrary to

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law, and contrary to his agreement to serve without salary; third, that he sold to himself certain municipal bonds of Bourbon county, Kansas, which were the property of the bank, at considerably less than their actual value. All of these acts are alleged to have been done while Drake was acting as the managing officer of the bank, without the authority or knowledge of the board of directors of the bank. The answer alleged, among other things, that these acts were done with the knowledge, consent and approval of the officers and directors of the bank, and that a record of them was made in the usual course of business in the proper books of the bank. It was also alleged that the demand certificates of deposit for interest were signed by the proper officers of the bank, that they were made payable to Mr. Drake, and that none of them were signed by him as cashier or otherwise. It is also alleged that all of the payments were voluntarily made to him by the bank with full knowledge of all the facts and circumstances attending the same, and that the officers and directors had actual knowledge thereof. The case was first tried at the December Term, 1881, of the district court, and judgment was then entered for the defendant upon a demurrer to the plaintiff's evidence. It was then brought to this court for review, and the judgment of the district court was reversed, and the case remanded for a new trial. (*National Bank v. Drake*, 29 Kas. 311.) It was again tried at the May Term, 1884, of the district court with a jury, when certain particular questions of fact were submitted, which, with the answers thereto, are as follows:

"1. Was there an understanding between the other directors of the bank and the defendant, at and before he was made cashier of the bank, that if he was made cashier he would serve without salary? A. Yes.

"2. If you find that there was an understanding that defendant would serve without salary, was the understanding between the board and the defendant ever changed after he became cashier? A. No.

"3. Did the defendant, at any time after he had taken any sum for salary, inform the board of directors of the bank that he had done so? A. No.

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"4. Was it a rule of the bank before and during all of the time that defendant was its cashier, that no interest should be paid on demand certificates of deposit? A. Yes.

"5. Did the defendant have any agreement with the board of directors of the bank as to the transfer to him of the Bourbon county funding bonds, at or before the time he took them? A. No.

"6. While the defendant was an officer of the bank, did he ever inform the board that he had taken interest on demand certificates of deposit? A. No.

"7. Did the directors at any meeting of the board authorize the taking by defendant of the said sums of interest? A. No.

"8. Did the directors at any meeting of the board ratify the taking by defendant of the said sums of interest? A. No.

"9. Did the directors at any meeting of the board authorize the taking by the defendant of the Bourbon county bonds? A. No.

"10. Did the directors at any meeting of the board ratify the taking by the defendant of the Bourbon county bonds? A. No.

"11. What was the value of the Bourbon county funding bonds at the time the defendant took them? A. 95 cents, with accrued interest.

"12. Did the board of directors ratify the first taking of salary by the defendant at any time? A. No.

"13. Did the board of directors at any time ratify the second taking of salary by the defendant? A. No.

"14. Did the board of directors at any time ratify the taking of the several amounts of interest, for which this suit is brought? A. Yes.

"15. If 'Yes,' then state how the board did in fact ratify it. A. By individual consent of a majority of the board.

"16. Did the board of directors at any time ratify the taking of the Bourbon county funding bonds by the defendant? A. No."

A verdict was returned by the jury in favor of the plaintiff for the sums alleged to have been wrongfully received by Drake for salary as cashier, and for the difference between the amount actually paid by him upon the municipal bonds which he purchased from the bank and their value at the time he received them, amounting in all to \$4,408.75. The jury refused to find for the plaintiff as to the sum claimed for inter-

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est on demand certificates. The plaintiff then moved the court to render judgment for the additional sum received by Drake as interest on deposits, basing its motion on the answers returned by the jury finding that the board of directors of the bank did not, as a board, authorize or ratify the taking of the interest by the defendant, and that the only ratification was by individual consent of a majority of the directors. This motion was disallowed, and judgment rendered in accordance with the general verdict returned by the jury. The plaintiff brings the case here.

Ware & Ware, for plaintiff in error:

The plaintiff in error claims, first, that the board of directors had no power to ratify, and that the alleged ratification constitutes no defense; and, second, that there never was any ratification, even if ratification would constitute a defense.

I. In order to lay a foundation for the examination of the first claim, we must establish some preliminary propositions:

1. The cashier of a national bank is its chief executive officer. His duties are defined by law, and are strictly executive. He does not regulate or control the business; he transacts it. (Morse on Banks, 1st ed., p. 137; Ball on National Banks, p. 265; *Bank v. Bank*, 10 Wall. 604.)

The cashier, being an executive officer who transacts business for a bank, must, perforce, be an agent. But whose agent is he?

2. The cashier of a bank is the agent of the stockholders, and is not the agent of the board of directors. The board has its well-defined legal and statutory duties to perform, the same as the cashier has. The board therefore is also an agent of the stockholders. Consequently the cashier and the board are coagents of a common principal. The cashier is no more the agent of the board than the board is the agent of the cashier. The board can elect a cashier, but his duties are defined by law. He obeys the law and not the board. (Thompson on Powers of Bank Cashiers, §§ 1, 5; *Bank v. Barrington*, 2 Pa.

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27; *Bank v. Bank*, 1 Par. Sel. Cas. 180, 240; *Bissell v. Bank*, 69 Pa. St. 415.)

3. If an agent wrongs his principal, the wrong cannot be forgiven or pardoned by another agent. The principal alone must do the pardoning. If a cashier converts to his own use money of a bank, the directors cannot forgive the cashier. They have no such power. They are agents merely, and their duties are defined by law. If a board of directors had power to forgive a cashier for robbing a bank, then a majority of the board could collude together with the cashier and continue to rob, divide and forgive.

"A usage of the board of directors to permit the cashier to misapply the funds of the bank cannot exonerate his sureties." (*Minor v. Bank*, 1 Pet. 46. See also *Burke v. Smith*, 16 Wall. 395; *Upton v. Tribilcock*, 91 U. S. 48; *Bedford Co. v. Bowser*, 48 Pa. St. 37; *Austin v. Daniels*, 4 Denio, 299; *Salem Bank Case*, 17 Mass. 1.)

4. The doctrine of ratification has no application to a transaction or wrong wholly between principal and agent. Ratification is the acceptance by a principal of the acts of one who, without original authority, acted with *third parties* in the name of such principal. It is a branch of the doctrine of principal and agent. The acceptance must be by the principal; one agent cannot ratify the acts of another agent unless the acts were, in the first place, lawful; and secondly, were with third parties in the name of the principal; and thirdly, the ratifying agent must have had previous authority, before the act, to command the performance of the act ratified, or be given special power afterward. (Domat's Civil Law, Strahan's ed., § 2364.)

In all cases of ratification there must be an "outsider"—a third person—either actual or in contemplation of law; and the ratification must operate on the outsider, the third person. (Wharton on Agency, § 74.) Acquiescence is a branch of the doctrine of ratification. It is a ratification by presumption. (*Kent v. Mining Co.*, 78 N. Y. 187.)

5. The ratification of a tort must be by a principal, concerning some act done to a *third party* by the command of, or for the use and benefit of, the principal. There is no such a thing as the ratification of a tort committed by an agent upon the principal. The idea of ratification of a tort, implies by its very terms the existence of an agent and a third person. In strict language there is no such thing as a ratification of a tort. To ratify means to make valid. That which is void cannot be made valid. (7 Hen. IV, fo. 35; 4 Coke's Inst. 317.) The ratification of a tort is simply the assumption of a liability created by law.

The directors of a bank are agents, and have no power to make gifts. They cannot give away the money of the bank, or give away its right to money. It may be asked: If the board of directors cannot ratify the act of defendant in error, who can? We confess our ignorance; we do not know. The directors cannot do it; it is their duty to collect the money. A majority of the stock at a stockholders' meeting cannot do it. The majority of stockholders might pass a resolution directing the board *not to sue*, and might even elect a board on that issue. If the majority did this, then if there was one dissenting stockholder he might sue in behalf of the bank, on showing that the bank would not. The desire not to sue must be unanimous, and must continue for a length of time that would bar the claim by limitation. Then, and not till then, would the trustee be safe from suit; and this would be forgiveness, and not ratification—forgiveness by the stockholders and not by the corporation. (*Hazard v. Durant*, 11 R. I. 196; 7 Hare, 129.)

6. The by-laws of a national bank, that are passed within the scope of its authority, are as binding upon its officers as statute law. (*Cummings v. Webster*, 43 Me. 192; *Anacosta Tribe v. Murback*, 13 Md. 91; *German Evan. Cong. v. Pressler*, 17 La. An. 127; *McDermott v. Board of Police*, 5 Abb. Pr. 422; *Sassenscheldt v. Ben. &c. Union*, 1 City Ct. Rep. N. Y. 8.)

7. Section 5209 of the U. S. banking law is:

"SEC. 5209. Every . . . cashier . . . of any associa-

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tion, who . . . willfully misapplies any of the moneys, funds or credits of the association, . . . shall be deemed guilty of a misdemeanor, and shall be imprisoned," etc. (See also *In re Van Campen*, 2 Benedict, 419; *United States v. Tainter*, 11 Blatchf. 374.)

The facts of the case being undisputed, as is shown by the special findings, then, if the various propositions of law are as we have stated them, it follows that the doctrine of ratification has no reference or application to this case; because, first, the liability of the defendant is for a wrong done by him to his principal, the stockholders; and, second, there being no third person, the doctrine of ratification does not apply.

II. That the members of a board must act *as a board*, and cannot act individually, we deem to be so well settled that the citation of authorities is unnecessary. Without waiving that point, we argue the question on the fundamental proposition that the board could not ratify at all.

A. A. *Harris*, for defendant in error:

Counsel for the plaintiff in error contend, first, that the board of directors had no power to ratify, and that the alleged ratification constitutes no defense; and second, that there never was any ratification, even if ratification would constitute a defense. It is more convenient, for the purposes of this argument, to discuss the second proposition of counsel for plaintiff in error before proceeding with the other.

Question 14 was, "Did the board of directors at any time ratify the taking of the several amounts of interest for which this suit is brought?" Ans., "Yes." Question 15 was, "If yes, then state how the board did in fact ratify it?" Ans., "By individual consent of a majority of the board." The jury were asked by question 14 to say whether there was ratification; and am I not right in declaring that where the jury were required to answer whether or not the board of directors had ratified the action of defendant in error in taking the interest, and when they had answered in the affirmative, then such answer was conclusive upon the plaintiff in this case?

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The question submitted to them was, "Was there ratification?" which is but another form of asking, Was there approval? Was there sanction? Was there confirmation? The jury found that there was approval, sanction, confirmation. The case was tried, as the pleadings and the special questions submitted to the jury show, upon the theory that the board of directors might ratify. Is it not true, then, that when the jury have found that there was ratification, that further inquiry is precluded?

When asked to state how the board did in fact ratify Mr. Drake's action, the jury say, "By individual consent of a majority of the board." This implies not only ratification in law, but, taking the answer in its ordinary signification, consent to the act itself upon the part of the board. Consent implies knowledge, and therefore the full meaning of this last answer would be, that the board of directors, with full knowledge of the fact, consented to it. The jury, after hearing the evidence adduced on the trial and the instructions of the court, might very well come to the conclusion that there was ratification, and they might so answer. And yet it might be impossible for them to express in words how the ratification was obtained, or what constituted it. Indeed, the counsel on the other side might vainly endeavor for an indefinite time to define ratification in precise terms, but the fact and truth remain that the jury have answered that there was ratification. That finding has not been disturbed—it remains as a settled proposition; and I most respectfully submit that it is not within the province of this court to say that there was not ratification.

As to the first proposition stated by counsel for plaintiff in error, viz., that the board of directors had no power to ratify, it should be remembered that the allegations of the petition upon this point are, that the taking of this interest was contrary to the orders of the board of directors, and that the case was tried in the court below wholly upon the theory that the board of directors might ratify the taking of the interest, if, in fact, it was not authorized in the first instance. The special questions submitted by the plaintiff are all predicated upon

the theory that the board of directors might ratify; and I submit that when the case was tried in the court below upon that theory, and the motion for judgment for the interest was predicated upon that idea, it would be an outrage, both upon the court below and the jury, to permit the bank now to claim that the board had no power to ratify. The theory that the board could not ratify was not advanced when the case was on trial. When, at the instance of plaintiff, the jury had answered affirmatively to the question as to whether there was ratification, it is not in good faith for the plaintiff to say now that the board had no power to ratify.

Counsel for the bank say that not even a majority of the stockholders could ratify; that, perhaps in strictness, not all of them could. But they did not put their case upon that ground in the court below; for aught this court knows, evidence was adduced of the fullest and most complete ratification upon the part of the stockholders of this corporation.

The defendant in error was neither the agent of the directors, nor of the stockholders. The question of principal and agent does not apply, and consequently all the authorities quoted upon that point are irrelevant. In discussing this question when the case was in this court before, Mr. Justice BREWER said: "We think, therefore, that it will not do to say that it [ratification] is strictly a branch of the doctrine of principal and agent. It is the confirmation of a voidable act." (29 Kas. 324.) The declaration of this court, therefore, disposes of the major part of the argument of counsel for the bank.

The startling declaration is made by counsel that in all cases of ratification there must be an outsider, *i. e.*, a third person, either actual or in contemplation of law, but no authorities are quoted to sustain it, for the reason, probably, that none can be found.

Counsel for the bank say that the board had no power to ratify. Stated in another form, I suppose that proposition would be that even if the act was without the knowledge or consent of the board of directors in the first instance, they could not afterward ratify and confirm it so as to make it

Brief of Defendant in Error.

binding upon the bank. Mr. Justice Story, in *Fleckner v. Bank of U. S.*, 8 Wheat. 339, said :

“The whole business of the bank is confided entirely to the directors, and of course with them it would rest to fix the duties of the cashier or other officers.”

This court said, in the case of *Bank v. Drake*, 29 Kas. 325, that—

“The directors constitute the governing body of the bank, the bank itself being an incorporeal entity without power to see or know. The directory constitutes the visible representative, the thinking, the knowing head, of the bank. Its knowledge and purpose is the knowledge and purpose of the bank.”

By the express provisions of the federal statute governing national banks, (Rev. Stat. of U. S. § 5136,) they are authorized to receive deposits. Their business is to be managed by a board of directors elected by the stockholders. In the case of the *Salem Bank v. Gloucester Bank*, 17 Mass. 1, it is said :

“In certain things the directors of a bank have all the authority of the corporation vested in them by a vote, and in respect to such things their engagements, express or implied, will bind the corporation.”

Now, then, this bank was authorized to receive deposits. Being so authorized, it certainly had authority to pay interest on the same if its board of directors saw fit, even though the deposits had been made upon the condition that no interest was to be paid. While there was an allegation in the petition that there were by-laws of the bank, to the effect that no interest should be paid on demand certificates of deposit, there is no finding to that effect by the jury. These certificates, it has been shown, bore interest on their face. They were signed by officers of the bank other than Mr. Drake. Why, then, was not the bank bound by the obligation which it entered into to pay interest on the deposits? Grant, for the sake of the argument, that there was a rule of the bank that no interest should be paid on such deposits as those in question, still that would not make it criminal in one to receive interest on the same, and having received it with the consent of the directors, as is shown

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by the findings of the jury, I cannot see why the bank can now question the validity of the transaction.

"It must also be remembered that the tendency of modern judicial interpretation and legislation has been to waive needless formalities, and that consequently at the present many agreements are held binding upon corporate bodies, even without ratification, which a few years since would, from technical reasons, not have been so." (*Durham v. Coal Co.*, 22 Kas. 244.)

"Ratification may be inferred from corporate acts involving or implying confirmation." (*Howe v. Keeler*, 27 Conn. 538; *Ridgeway v. Farmers' Bank*, 19 Serg. & R. 256; Field on Corporations, § 207.)

In *Bank v. Drake*, 29 Kas. 331, this court said:

"We think that the question is rather to be treated as a question of fact, and to be determined by a jury, as to whether the bank acquiesced in and ratified the action of the cashier, than to be disposed of as a question of law and dependent upon a purely legal presumption."

Upon the whole case, as this court said in *Bank v. Drake*, supra:

"It may be fairly submitted to a jury whether, independent of any proof of actual knowledge, the action of the cashier has not been so open, and long continued, and under such circumstances, that it may be inferred that the directors assented to his acts."

The fact is, that for a long time this bank had the use of Mr. Drake's money; and it is not in good faith for it to complain after it has had such use and paid him only a moiety of what his money was actually worth.

The opinion of the court was delivered by

JOHNSTON, J.: This case can be easily disposed of. The only question presented arises upon the refusal of the court to enter judgment in favor of the plaintiff upon the findings of the jury for the amount of money taken from the bank by the defendant as interest on demand certificates of deposit that had been issued to himself while he was serving as president

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and cashier of the bank. The defendant admits that he took the money at the times and in the amounts charged by the plaintiff, and the jury have found that during all the time the defendant was acting as an officer of the bank, there existed a rule or by-law of the bank which prohibited the payment of interest on demand certificates of deposit, and that at no time while the defendant was an officer of the bank did he ever inform the board of directors that he had taken interest on these certificates; and it was also found that the directors did not at any meeting of the board authorize or ratify the action of the defendant in taking interest. The defendant contended and contends that although his act in taking the money was contrary to the by-laws of the bank, yet that there had been a ratification of the unauthorized act by the board of directors which is binding upon the bank. After stating that the directors had never at any meeting of the board ratified the taking of interest by the defendant, the question was asked the jury: "Did the board of directors at any time ratify the taking of the several amounts of interest?" To this question an affirmative answer was given; but in the next finding the jury explained particularly how the supposed ratification had been made, finding that it was "by individual consent of a majority of the board." The last finding, stating particularly what was done, controls and prevails over the former one stating the general conclusion that there had been a ratification. These findings clearly show that the only sanction which the unauthorized acts of the defendant have received from the plaintiff, was given by the individual members of the board acting singly and separately, and not as a board. Action thus taken is not binding on the bank, and does not constitute a defense to the plaintiff's claim. The statute declaring the method in which the bank may exercise corporate power provides that the appointment and dismissal of its officers, the enactment of by-laws regulating the manner in which its officers and agents shall conduct its business, and the general supervision and management of its affairs, shall reside in and be exercised by a *board* of directors. (Rev. Stat. U. S.

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National bank —
powers vested
in directors as
a board.

§ 5136.) This statute provides for the election of a president of the board, and otherwise assumes that the directors shall act unitedly as an organized body. The election of an individual as a director does not constitute him an agent of the corporation with authority to act separately and independently of his fellow-members. It is the board duly convened and acting as a unit that is made the representative of the company. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members. As the only powers conferred upon directors are those which reside in them as a board and when acting collectively as such, the individual consent of a majority of the members acting separately is not enough to ratify the unauthorized appropriation of the money of the bank by the defendant. (Angell & Ames on Corporations, § 504, *et seq.*; Morawetz on Private Corporations, § 247; Field on Corporations, § 242; *Baldwin v. Canfield*, 26 Minn. 43; *First National Bank v. Christopher*, 11 Vroom, 435; *Junction Rld. Co. v. Reeve*, 15 Ind. 236; *In re Marseilles Rly. Co.*, Law Rep., 7 Ch. App. 161; *D'Arcy v. Tamor & Co. Rly. Co.*, Law Rep., 2 Exc. 158; *Schunn v. Seymour*, 24 N. J. Eq. 143; *Cammeyer v. United German Churches*, 2 Sandf. Ch. 186; *Edgerly v. Emerson*, 3 Foster, 555; *Stoystown & Greensburg Turnpike Road Co. v. Craver*, 45 Pa. St. 386; *Keeler v. Frost*, 22 Barb. 400. See also the following cases, which are somewhat analogous and applicable: *Aikman v. School District*, 27 Kas. 129; *Mincer v. School District*, 27 id. 253; *Comm'rs of Anderson Co., v. P. & F. R. Rly. Co.*, 20 id. 534; *P. & F. R. Rly. Co. v. Comm'rs of Anderson Co.*, 16 id. 302; *Herrington v. District Township of Liston*, 47 Iowa, 11; *McCortle v. Bates*, 29 Ohio St. 419.)

The conclusion which we have reached renders it unneces-

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sary to consider the other questions so much and so well argued by counsel with regard to the relations existing between the cashier and the board or directors, and which both of them sustain toward the bank, and whether the doctrine of ratification can have application to a transaction wholly between the board of directors and the cashier.

The ruling of the district court disallowing the plaintiff's motion for judgment *non obstante veredicto* will be reversed, and the cause remanded with directions to enter judgment on the special findings of the jury for the additional amount appropriated by the defendant without authority of the bank as interest on demand certificates of deposit, in accordance with the plaintiff's application.

All the Justices concurring.

THE CAPITAL BANK OF TOPEKA, *et al.*, v. ANDREW J. HUNTOON.

1. SHERIFF'S SALE; *Irregularities, Cured; Matters, Not Cured.* Mere irregularities in the proceedings connected with a sheriff's sale are cured by the order of the court, made some considerable time afterward, confirming the sale; but matters which are not mere irregularities, or which form no part of the proceedings connected with the sale, as, for instance, fraudulent combinations which might prevent a fair and equitable sale, and matters relating to the ownership of the property sold, are not cured nor finally or conclusively determined by the order confirming the sale.
2. REVIEWABLE IRREGULARITIES; *Action to Set Aside Sale.* Irregularities affecting a sheriff's sale may be examined in the district court on motion to confirm the sale, or to set aside the sale. Some of such irregularities may also be reexamined in the district court by proceedings under §§ 568 to 580 of the civil code; and all such irregularities, so far as they are shown by the record, may be reexamined on petition in error in the supreme court; and in some particular cases of fraud and irregularity, parties may have an action in the district court in the nature of a suit in equity to set aside a sheriff's sale, and for such other and further relief as justice and equity may

35	577
36	439
36	440
35	577
40	230
35	577
41	332
42	333
35	577
43	276

35	577
55	484
35	577
57	834
35	577
61	430
35	577
62	581

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authorize. But whatever remedy the aggrieved party may choose, he must resort to the same within proper and reasonable time.

3. **SHERIFF'S SALE; Agreement to Bid; Sale, Not Set Aside.** Although combinations which might prevent competition at sheriff's sales are always looked upon by courts with great disfavor, yet where no combination was made except that the several judgment creditors appointed one of their number as agent to attend the sheriff's sale and purchase the property in his own name, and for their benefit, unless it was sold for more than he wished to pay; and there was no agreement, arrangement or understanding between the judgment creditors that would prevent any one of them, or any other person, from bidding for himself; and the agent appeared at the sale and purchased the property as agreed: *Held*, Under the circumstances of this case, that the aforesaid agreement would not of itself and alone be sufficient to authorize the judgment debtor, more than a year after the sale was made, and several months after it was confirmed, and after the sheriff's deed was executed, and after some of the property had been sold to innocent purchasers, to commence and maintain an action in the nature of a suit in equity to set aside the sheriff's sale.
4. ——— *Old Appraisalment; Sale, Not Voidable.* A sale of real estate by a sheriff upon a second offer of sale under an appraisalment four years old, is not for this reason alone void, nor is it voidable in this action.
5. ——— *Inadequacy of Price.* Inadequacy of price, taken alone, is seldom, if ever, sufficient to authorize the setting aside of a sheriff's sale; but that ground, with others, is sometimes sufficient.
6. ——— *Void Sale.* Where appraisalment has not been waived and real estate is sold at sheriff's sale for less than two-thirds of its appraised value, the sale is void.
7. **SEVERAL JUDGMENTS; Payment of One before Sale.** Where a sheriff's sale is made to satisfy the judgments of several judgment creditors, and the judgment of one of such creditors has previously been paid, but the amount for which the property was sold is not enough to satisfy the other judgments, *held*, that the fact that one of the judgments had previously been paid, will not of itself render the sale void or voidable; but the judgment creditor whose judgment has been paid should not be allowed to receive any portion of the proceeds of the sale.
8. **EXECUTION; Judgment, When Not Dormant.** Where an action was commenced by a judgment creditor against the judgment debtor to subject certain property to the payment of the debts of such judgment debtor, and another judgment creditor was made a party to the suit within less than five years after such second judgment creditor's judgment was rendered, and in the above-mentioned action judgment was finally rendered in favor of both the judgment cred-

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itors and against the judgment debtor, and an execution was issued thereon within less than five years after this last-mentioned judgment was rendered but more than five years after an execution had been issued in favor of the second judgment creditor on his first judgment, and the property was sold on such execution, *held*, that the judgment of the second judgment creditor is not dormant to the extent of depriving him of participating in the proceeds of the sheriff's sale.

9. **FINDING, Sustained.** The district court held that still another judgment creditor had the right to participate in the proceeds of the sheriff's sale; and nothing appearing to the contrary, and none of the judgment creditors objecting, such holding must be sustained.
10. **JUDGMENT CREDITORS—Combination; Setting Aside Sale; Innocent Purchasers.** Where, at a sheriff's sale, the property was sold at only about one-fourth of its actual cash value, and a part of the property was sold in violation of law at less than two-thirds of its appraised value, and the appraisal itself had been made more than four years prior to the sale, and at a time when the price of property was very low, and an agreement was made among the several judgment creditors that one of their number, as their agent, should have authority to purchase the property for them, and he did so purchase the property, which agreement might have induced the other judgment creditors not to bid; and one of the judgments for the payment of which the property was sold had previously been paid: *Held*, That, taking all things together, they are sufficient to authorize the setting aside of the sheriff's sale in an action brought for that purpose, with reference to all lots which still remain in the hands of the judgment creditors and have not been sold or transferred by them to innocent purchasers.
11. **LACHES—Sale, When Not Set Aside.** But where the judgment debtor was guilty of *laches* in not resorting to the ordinary remedies to set aside the sale, but waited more than a year after the sale and a long time after the confirmation of the sale, and after the sheriff's deed had been executed, and after some of the property had been sold and conveyed to innocent purchasers, before he commenced any action to question the regularity validity or fairness of the sale, and then commenced an action in equity to set aside the sale, *held*, that the sale cannot be set aside with regard to the property sold and conveyed to innocent purchasers; and with regard to such property the judgment debtor has no remedy.
12. **TAXES—Condition of Setting Aside Sale.** And where the judgment creditors after the sale paid a large amount of taxes due on the property sold, *held*, that the sale should be set aside only upon the condition that such taxes be paid by the judgment debtor or out of the proceeds of another sale of the property.

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13. *RECORD, as Evidence; Presumptions.* A part of a record will generally prove what it purports to prove, but cannot prove more than that, and no liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding deficiencies, or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record.

Error from Shawnee District Court.

ACTION brought by *Andrew J. Huntoon*, against *The Capital Bank of Topeka* and others, to set aside a certain sheriff's sale, and for other relief. Trial at the January Term, 1884, before Hon. JOHN W. DAY, judge *pro tem.*, and a jury; judgment for the plaintiff. The defendants bring the case to this court. The opinion contains a sufficient statement of the facts.

J. G. Slonecker, and *W. C. Webb*, for plaintiffs in error.

W. P. Douthitt, *C. M. Foster*, *Foster & Haywood*, and *Waters & Chase*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Shawnee county by Andrew J. Huntoon against the Capital Bank of Topeka, Arthur Quick, the Topeka Bank, (formerly known as the Topeka Bank and Savings Institution,) John R. Mulvane, Joseph Black, Willis Norton, and N. C. McFarland, to set aside a sheriff's sale, and for other relief. The case was tried before the court and a jury, and both the court and the jury made special findings of fact, and the court made one conclusion of law, and upon such findings and conclusion the court rendered judgment in favor of the plaintiff and against the defendants. The defendants bring the case to this court.

Among the admitted facts of the case are the following: In 1873, Joel Huntoon & Son were largely indebted to various persons and corporations, among which were the Capital Bank, the Topeka Bank, the Mastin Bank, Arthur

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Quick, and Joseph Black & Son, and as to these creditors named, A. J. Huntoon, the brother of Joel Huntoon, was the surety of Joel Huntoon & Son. At the same time, Joel Huntoon was the owner of a large number of lots in Huntoon's addition to the city of Topeka; and to secure A. J. Huntoon, his surety, he, with his wife, on December 23, 1873, conveyed these lots, about 119 in number, to A. J. Huntoon. Afterward, judgments were rendered on the foregoing claims against Joel Huntoon & Son, as principals, and A. J. Huntoon, as surety, as follows: In favor of the Capital Bank, on December 30, 1874, for \$645.72; in favor of Arthur Quick, on December 30, 1874, for \$554.50; in favor of the Mastin Bank, on March 9, 1875, for \$9,992.14; in favor of Joseph Black & Son, on May 13, 1875, for \$1,197.69; and in favor of the Topeka Bank, on March 15, 1876, for \$862.09. The judgments in favor of the Capital Bank, Arthur Quick, Joseph Black & Son and the Topeka Bank were rendered in the district court of Shawnee county, Kansas, and the judgment in favor of the Mastin Bank was rendered in the circuit court of the United States for the district of Kansas. On July 19, 1875, the Capital Bank brought an action in the district court of Shawnee county in the nature of a creditors' bill, against Joel Huntoon and wife, A. J. Huntoon, Arthur Quick, Joseph Black & Son, and other judgment creditors of Joel Huntoon & Son, and of Joel Huntoon, but did not include in this action the Topeka Bank or the Mastin Bank, and asked that the liens of the several parties might be adjusted, and that the conveyance made by Joel Huntoon and wife to A. J. Huntoon in 1873 be declared a mortgage and set aside, and that the property be ordered to be sold to pay the debts of the Huntoons. On December 15, 1875, the Mastin Bank was made a party defendant, and on that day it filed its answer. On February 12, 1876, a judgment was rendered in the action, adjudging and decreeing that the deed executed by Joel Huntoon and wife to A. J. Huntoon was a mortgage, and that the real estate therein described should be sold, and that the proceeds of the sale should be applied in payment of the judg-

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ments in favor of the Capital Bank, Joseph Black & Son, Arthur Quick, and the Mastin Bank, *pro rata* among themselves, but in priority to the other judgment creditors, and that if there should be any excess after paying those four judgments, the excess should be applied in payment of the judgments of the other judgment creditors as their respective priorities might afterward be determined, and directing that an order of sale should be issued to the sheriff of Shawnee county, commanding him as upon execution to appraise and sell the real estate and make a return of his proceedings into court.

On March 22, 1876, an order of sale was issued and the aforesaid lots were appraised, and on May 8, 1876, the order of sale was returned—no sale having been made, for want of bidders. On July 22, 1876, an *alias* order of sale was issued, and on August 31, 1876, a like return was made. On September 2, 1876, a third order of sale was issued, and the old appraisement was set aside and a new appraisement was ordered to be made, and on September 14, 1876, was in fact made, and afterward the order of sale was returned as the others had been before—no sale having been made, for want of bidders. On September 19, 1879, the Topeka Bank applied to be made a party defendant to the aforesaid action with leave to answer, which application was granted; and it filed its answer setting up its judgment and claiming priority over the other judgment creditors. In the mean time the Capital Bank and the Mastin Bank had ceased to do business, and N. C. McFarland and Willis Norton had become the owners of the Capital Bank judgment, and Arthur Quick, John R. Mulvane and Willis Norton had become the owners of the Mastin Bank judgment. On September 4, 1880, a fourth order of sale was issued, and the sheriff proceeded to advertise and sell the property under the previous appraisement of September 14, 1876, and on October 18, 1880, sold all the foregoing lots to Arthur Quick. On December 18, 1880, the sale was confirmed and the priorities were again determined; and it was ordered that the proceeds of the sale, after deducting the costs, should be ap-

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plied *pro rata* as credits upon the judgments rendered in favor of the Mastin Bank, the Topeka Bank, the Capital Bank, Arthur Quick, and Joseph Black & Son. On March 1, 1881, the sheriff duly executed a deed to Arthur Quick for all the foregoing lots, which deed was duly recorded. Arthur Quick, in purchasing the property and taking a deed to himself, acted as the agent for all the above-mentioned judgment creditors, and after the sheriff's deed was executed the property was divided *pro rata* among such judgment creditors precisely as the money would have been divided among them had Quick purchased the land for himself alone, and had paid cash therefor to the amount of his bid; and Quick conveyed to each of the judgment creditors his or its *pro rata* share of the property, and each of such judgment creditors paid his or its proportion of the costs and of the taxes then due against the property. These taxes were evidenced by tax-sale certificates and tax deeds held by J. R. Mulvane, who transferred his tax interests in and to the property to the parties respectively who obtained the property. Some of the lots obtained in this manner were sold and conveyed by the parties receiving them to innocent purchasers, but the greater portion of them still remains in the hands of the several judgment creditors or their representatives. On November 22, 1881, A. J. Huntoon instituted this present action. It was tried in July, 1883, and was finally decided in the court below on March 29, 1884.

Upon the foregoing facts and some others, the court below found as a conclusion of law that the sheriff's sale was "void, and should be held for naught." The court, however, did not render any judgment setting aside the sale. The judgment that was in fact rendered was that the sheriff's deed and the deeds from Quick to the other judgment creditors conveying the lots which such judgment creditors still hold and have not yet sold or disposed of, should, as to such lots, be set aside and held for naught, and the title to such lots should be reinvested and replaced in Joel Huntoon, subject to the payment of his debts for which Andrew J. Huntoon is surety; and the sheriff's deed and the deeds to such of the lots as had been sold

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by the judgment creditors to innocent purchasers were with respect to such innocent purchasers' lots allowed to remain in full force and to be valid, and an amount equal to the value of such lots sold to innocent purchasers, as such value was shown by the evidence to be, on November 1, 1881, was credited on the judgments of the Capital Bank, the Topeka Bank, the Mastin Bank, and Joseph Black & Son, leaving a portion of such judgments still unpaid, which was ordered to be paid by the Huntoons, or that the lots so reinvested and replaced in Joel Huntoon should be sold as on execution to pay the same; and the Arthur Quick judgment was ordered and adjudged to be discharged and satisfied. Now while the court below did not set aside the sheriff's sale at all, and did not set aside the sheriff's deed, nor the deeds from Arthur Quick to the judgment creditors, except with respect to a portion of the lots sold, yet we think the question of the validity of the sheriff's sale is involved in this case; and indeed, it is the main and principal question involved in the case. If the sale is valid, everything is valid. There is no defect or infirmity in or affecting any of the other proceedings, except those which are supposed to render the sale void. The defendant in error, A. J. Huntoon, claims that the sale is void for various reasons, as follows: (1) There was a fraudulent combination among the judgment creditors to prevent competition at the sale; (2) the sale was made upon an appraisal of the property made more than four years prior to the sale; (3) the sale was for a grossly inadequate price; (4) eight of the lots were sold at less than two-thirds of their appraised value; (5) J. R. Mulvane, who partially represented two of the judgment creditors, held tax titles on some of the lots at the time of the sale; (6) Arthur Quick's judgment had been previously paid; (7) the Mastin Bank judgment was dormant at the time of the sale; (8) the Topeka Bank was not a party to the suit until after the judgment of February 12, 1876, subjecting the lots to the payment of the judgment creditors' claims, had been rendered.

On the other hand, the plaintiffs in error, defendants below,

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claim that the sheriff's sale is valid; that the sheriff's deed is valid; that the deeds from Quick to the judgment creditors are valid; that Quick's judgment was not paid; that there was no fraudulent combination, nor any fraud on the part of the judgment creditors or their representatives; and that the judgment of the court below should be reversed for various reasons, among which are the following: (1) The plaintiff below mistook his remedy; his remedy being first to resist the confirmation of the sheriff's sale and to move to set it aside, and afterward, if unsuccessful, to commence a proceeding under §§ 568 to 580 of the civil code, which provide for reversing, vacating or modifying judgments or orders in the same courts in which they are rendered; and in either case, if unsuccessful to appeal to the supreme court; (2) that by virtue of the confirmation of the sheriff's sale all the substantial matters and things attempted to be litigated in this action were adjudicated and became and were *res adjudicatæ* before this action was commenced; (3) no complete record was introduced in evidence on the trial of this case, but only portions of certain records, which were introduced over the objections of the defendants below; (4) the finding that Quick's judgment was paid is against the evidence; (5) no fraud or collusion on the part of the judgment creditors was shown by the evidence nor found by the court or jury; (6) no finding was made that the sheriff's deed or any one of the deeds from Quick to the judgment creditors was void; (7) no judgment was rendered setting aside the sheriff's sale; (8) if Quick's judgment was in fact paid, such payment should not affect the rights nor result to the injury of the other judgment creditors; (9) when the sheriff's deed and the deeds from Quick to the other judgment creditors were partially set aside, the title to the lots should not have been vested in Joel Huntoon as it was, for he was not a party to the action; (10) and such title should not have been vested in Joel Huntoon for the payment of his individual debts, as it seems it was, but should have been made subject only to the payment of the debts of the firm of Joel Huntoon & Son; (11) no accounting between the judgment creditors

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and the Huntoons should have been had or ordered in this action, as Joel Huntoon & Son were not parties to the action; and if the sheriff's deed was set aside and not the sale, then the sheriff should have been ordered or permitted to execute another deed; but if both the deed and the sale were set aside, then the court should have ordered or permitted another order of sale to be issued and the property be again sold to satisfy the judgments; (12) but if such an accounting should have been had, then the judgment creditors should not have been charged with the value of the lots sold to innocent purchasers, estimated arbitrarily as of the date of November 1, 1881; (13) it was against equity, and erroneous, to vest the title to some of the lots in Joel Huntoon, and to charge the full value of all the other lots to the judgment creditors, freed from all the taxes paid by J. R. Mulvane and the judgment creditors, and to deprive the judgment creditors, including Quick, of all compensation for the taxes paid by them, and taxes which the Huntoons should have paid; (14) time should not have been given to Joel Huntoon & Son to pay the remainder of the judgment, as they were not parties to the suit.

We shall now proceed to consider the various questions presented to us by the parties to this action, but we shall not consider them in the order as heretofore stated.

I. The plaintiffs in error, defendants below, claim that the defendant in error, plaintiff below, has mistaken his remedy; that by his *laches* he has lost his proper remedies, and that he is now pursuing a wrong one. The property in this case was sold on October 18, 1880. It had previously been advertised for sale, and the plaintiff in this action had full, complete and *actual* notice of the sale. He knew that the property was to be sold on that day; and yet he made no appearance at the sale and did not in any manner resist the same. The sale was not confirmed until December 18, 1880, just two months after the sale; and yet the plaintiff did not appear at that time nor at any other time, to resist the confirmation of the sale, or to make any motion to have it set aside. The sheriff's deed was not executed until March 1, 1881, more

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than four months after the sale, and more than two months after the confirmation of the sale; and yet the plaintiff did not question the validity, regularity or fairness of the sale, nor did he commence any proceeding to overturn or defeat the sale until he commenced this action on November 22, 1882, more than one year after the sale, nearly one year after the confirmation of the sale, and nearly nine months after the sheriff's deed was executed. And he never appealed to the supreme court to have the order of the district court confirming the sheriff's sale reversed, vacated, or modified. The defendants below claim that the plaintiff has slept upon his rights, and that he cannot now maintain this action *in equity* to obtain the relief he now asks; that he has lost his remedy by his own *laches*, and that he now has no remedy. We shall consider this question along with the next question.

II. The plaintiffs in error, defendants below, also claim that the subject-matter of this action has been finally and conclusively determined by the order of the district court confirming the sheriff's sale, and that the entire question as to whether such sale was formal or informal, legal or illegal, valid or invalid, has been finally settled and is now *res adjudicata*. We think it is true that, with respect to some of the questions involved in this case, or in any case, the confirmation of a sheriff's sale is a final and conclusive adjudication. (*Paine v. Spratley*, 5 Kas. 525; *Bowman v. Cockrill*, 6 id. 311; *Cross v. Knox*, 32 id. 725; *Dickens v. Crane*, 33 id. 344; *Pritchard v. Madren*, 31 id. 39-49, *et seq.*) But with respect to many other questions, the confirmation of a sheriff's sale cannot be regarded as conclusive or as *res adjudicata*. (*Koehler v. Ball*, 2 Kas. 161; *White-Crow v. White-Wing*, 3 id. 276; *Benz v. Hines*, 3 id. 390; *Treptow v. Buse*, 10 id. 170, 179, 180; *Rice v. Poynter*, 15 id. 264, 268; *Harrison v. Andrews*, 18 id. 535; *Halsey v. Van Vliet*, 27 id. 477.) We think the substance of the foregoing decisions is that all mere irregularities in the proceedings connected with a sheriff's sale are cured by the order of the court, made some considerable time afterward, as in this case, confirming the sale. (See also Rorer on Judicial

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Sales, § 329; Freeman on Executions, § 311, latter part, and § 307.) But matters which are not mere irregularities, or which form no part of the proceedings connected with the sale, as, for instance, fraudulent combinations which might prevent a fair and equitable sale, and matters relating to the ownership of the property sold, are not cured nor finally or conclusively determined by the order confirming the sale. Irregularities affecting a sheriff's sale may be examined in the district court on a motion to confirm the sale or to set aside the sale. Some of such irregularities may also be reexamined in the district court by proceedings under §§ 568 to 580 of the civil code, (*Wheatley v. Terry*, 6 Kas. 427;) and all such irregularities, so far as they are shown by the record, may be reexamined on petition in error in the supreme court. (*Koehler v. Ball*, 2 Kas. 160, 169; *Challiss v. Wise*, 2 id. 193; *White-Crow v. White-Wing*, 3 id. 276; *Moore v. Pye*, 10 id. 246; *N. E. M. S. Co. v. Smith*, 25 id. 622.) But notwithstanding all these remedies, parties may in some particular cases of fraud and irregularity have an action in the district court in the nature of a suit in equity to set aside a sheriff's sale, and for such other and further relief as justice and equity may authorize. (*Cocks v. Izard*, 74 U. S. 559; *Troup v. Wood*, 4 Johns. Ch. 229; *Hamburg Mfg. Co. v. Edsall*, 1 Halst. 249.) The more summary remedies are not always adequate, and sometimes on account of particular circumstances the aggrieved party cannot well resort to such remedies even if they were adequate. But whatever remedy the aggrieved party may choose, he must resort to the same within proper and reasonable time. (*Spafford v. Beach*, 2 Doug. 150; *Prather v. Hill*, 36 Ill. 402; *Noyes v. True*, 23 id. 503; *Rigney v. Small*, 60 id. 416; *McKinneys v. Scott*, 1 Bibb, 155; *Bristow v. Payton*, 2 T. B. Mon. 91; *Cunningham v. Felker*, 26 Iowa, 117; *Daniel v. Modawell*, 22 Ala. 365; *Hancock v. Metz*, 25 Tex. 205; *Vanduyne v. Vanduyne*, 16 N. J. Eq. 93; *Ingram v. Belk*, 2 Strob. 207.)

III. There was no unlawful or fraudulent combination among the judgment creditors or their representatives to prevent competition at the sheriff's sale. The agreement between

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the judgment creditors was in fact that Arthur Quick should represent their interests at the sheriff's sale, and should have the authority to bid for and purchase the property for them in his own name, unless it should be sold for more than he wished to pay, and that after the sale was confirmed and the deed made to him for the property which he purchased, the property should be divided between them *pro rata*, and that J. R. Mulvane, who partially represented two of the judgment creditors, and who held certain tax deeds and tax-sale certificates against the property, or a portion thereof, should transfer his tax interests for their agreed value to the judgment creditors respectively who might finally obtain the property upon which he held such tax interests. Arthur Quick was the only person who was given authority to bid on the property in the interest of all the judgment creditors as a body; but each one of the judgment creditors had a right to bid for himself or itself. At three different times previous to this sale, this property had been offered for sale by the sheriff, on three different orders of sale, and could not be sold for want of bidders, and evidently the judgment creditors intended that it should be sold this time if they had to purchase it themselves, and they made this arrangement for that purpose. But there was no agreement, arrangement or understanding between them that would necessarily prevent any one of them from bidding for himself or itself at the sale, if he or it had so chosen, or that would necessarily prevent any other person or corporation from bidding. None of the judgment creditors, however, except Quick, purchased any of the property, and none of them made any bid thereon except Quick and J. R. Mulvane, who in part represented two of the judgment creditors. The other judgment creditors may possibly have refrained from bidding because of this arrangement. But there is nothing in the record, however, except the fact that Quick purchased all the property, and that but few bids were made except by him, that tends to show that this agreement or arrangement had the effect to prevent or did prevent any person from bidding. We do not think that

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this agreement or arrangement of itself furnishes sufficient ground to set aside the sale *in this proceeding*; and whether it would have furnished sufficient ground to set aside the sale if a motion had been made by the plaintiff in the proper court for that purpose before the sale was confirmed, before the sheriff's deed was executed, before any rights of innocent purchasers had intervened, we do not think that it is necessary to express any opinion; for no such motion was made. Combinations which might possibly prevent competition at sheriff's sales are always looked upon by courts with great disfavor; and courts sometimes go very far to set aside sheriff's sales for such reasons, when the application is made in proper time. (Freeman on Executions, § 297, and cases there cited; *Hamburgh Mfg. Co. v. Edsall*, 1 Halst. 249; *Morris v. Woodward*, 25 N. J. Eq. 32; *Underwood v. McVeigh*, 23 Gratt. 409, 422; *Gardner v. Morse*, 25 Me. 140; *Cocks v. Izard*, 74 U. S. 559, 562; *Atcheson v. Mallon*, 43 N. Y. 147; *Troop v. Wood*, 4 Johns. Ch. 229, 254; *Jones v. Caswell*, 3 Johns. Cases, 29; *Packard v. Bird*, 40 Cal. 378, 383.) It was the opinion of the trial court, as well as it is of this court, that the sale cannot be set aside in this proceeding for the sole and simple reason that there was an illegal or fraudulent combination to prevent competition at the sale; for whatever the effect of the agreement may have been, the agreement was not in fact fraudulent or illegal.

IV. The sale was made upon an appraisement of the property which had been made more than four years prior to the time of the sale, and therefore and for this reason it is claimed that the sale is void. We think differently. The property had been offered only once for sale under this appraisement, and there is no statute authorizing another appraisement to be made until after the property had been offered for sale a second time under any particular appraisement. (Civil Code, § 468.) Of course the sale should follow very soon after the appraisement, for otherwise the property might be worth vastly more at the time of the sale than it was at the time of the appraisement. Such was the fact in this present case. In this con-

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nection, see *Ayres v. Duprey*, 26 Tex. 593, 601. It is probable that the court in cases like this would be justified in ordering a second appraisement before the property had been offered twice for sale under the first appraisement; and certainly in cases where the sale is made at such a great length of time after the appraisement, the judgment creditor should be required at his peril to see that the property is sold at a fair price. We think, however, that in the absence of fraud or great hardship no sale should be held to be void or even voidable in an action like this, simply because it was made a long time after the appraisement was made. As to what should have been done if a motion had been made in proper time to set aside the sale, we express no opinion.

V. It is also claimed that the sale is void for the reason that the property was sold at a grossly inadequate price. Such a ground taken alone is seldom if ever sufficient to authorize the setting aside of a sheriff's sale. (*Moore v. Pye*, 10 Kas. 246; *Dewey v. Linscott*, 20 id. 684; *Northrop v. Cooper*, 23 id. 433, 441; *Savings Bank v. Marsh*, 31 id. 771, 773; *McGeorge v. Sease*, 32 id. 387, 390, 391.) Though that ground with others is sometimes sufficient. (*Dewey v. Linscott*, 20 Kas. 684; *Weir v. Ins. Co.*, 32 id. 325; *Freeman on Executions*, § 309, and cases there cited.) All the lots except eight, and there were about 119 in all, were sold for more than two-thirds of their appraised value. We shall have more to say with regard to these eight lots hereafter. With respect to those lots which were sold for more than two-thirds of their appraised value, we think the sale cannot for mere inadequacy of price be set aside in this proceeding. We shall have more to say hereafter with respect to this point, in connection with the other points.

VI. It is further claimed that eight of the lots were sold for less than two-thirds of their appraised value, and therefore and for this reason that the sale is void. There was no express waiver of appraisement in this case, and no implied waiver unless the facts of this case show it. Undoubtedly the sale of these eight lots would have been set aside if a mo-

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tion for that purpose had been made in the district court within proper time; but no such motion was made. The sale might also have been set aside under § 568, subdiv. 3, of the civil code, if a proper motion had been made therefor in proper time and before any intermediate rights of innocent purchasers had come into existence; but no such motion was made. The question then arises: Can the sale be set aside or held for naught in this proceeding? This question may be considered in two aspects: First, is the statutory requirement that the property shall not be sold for less than two-thirds of its appraised value a jurisdictional matter? or, second, is such requirement a mere direction to the officer, which he should follow, but the non-observance of which will not render the sale void but only voidable at the option of a party interested in having the sale set aside? The sale of these lots for less than two-thirds of their appraised value was evidently a mere oversight. No fraud in this respect was shown or found; but still the sale was in violation of law. Section 455 of the civil code provides, among other things, that "no such property [meaning any kind of real estate] shall be sold for less than two-thirds of the value returned in the inquest." Nearly all the authorities having application to this question hold, under similar statutes, that such sales are absolutely void. (*Gantly v. Ewing*, 44 U. S. 707; *Collier v. Stanbrough*, 47 id. 14; *Smith v. Cockrill*, 73 id. 756; *Succession of Hilligsberg*, 1 La. An. 340; *Baird v. Lent*, 8 Watts, 422; *Wolf v. Payne*, 35 Pa. St. 97; *Gardner v. Sisk*, 54 id. 506; *Strouse v. Drennan*, 41 Mo. 289; *Sprott v. Reid*, 3 G. Greene, 497; *Maple v. Nelson*, 31 Iowa, 322; *Harrison v. Doe*, 2 Blackf. 1; *Morse v. Doe*, 2 Ind. 65; *Babcock v. Doe*, 8 id. 110; *Davis v. Campbell*, 12 id. 192; *Cummins v. Pfouts*, 13 id. 144; *Evans v. Ashby*, 22 id. 15; *Fletcher v. Holmes*, 25 id. 458; *Tyler v. Wilkerson*, 28 id. 450.) There may be cases where this rule is not strictly adhered to. (*Allen v. Parish*, 3 Ohio, 188; *Williams v. Hickman*, 2 Harr. 463; *Wray v. Miller*, 20 Pa. St. 111; *Sydnor v. Roberts*, 13 Tex. 598; *Ayres v. Duprey*, 27 id. 593; *Shaffer v. Bolander*, 4 G. Greene, 201.)

Under the great weight of authority, we think it must be held that the sale of these eight lots is void, and that such sale must be held to be void in this present action, or in any action or proceeding.

It is also claimed that the sale should be held void because J. R. Mulvane, who partially represented two of the judgment creditors, held tax titles on some of the lots at the time of the sale. We fail to perceive any sufficient ground for this point, and of course it must be overruled.

VII. It is also claimed that the sale is void for the reason that Arthur Quick's judgment had been paid prior to the sale. Now the jury found that such judgment had been paid, and the court below followed such finding and made a similar finding itself, and yet it would seem to us that the preponderance of the evidence is on the other side. From sometime in October, 1876, up to February, 1877, conversations were had between Quick and Joel Huntoon from which it is claimed on the part of the Huntoons that the judgment was paid, and the testimony of Joel Huntoon, corroborated in part by F. R. Huntoon, his son, tends to sustain such claim, and in the absence of other proof is amply sufficient to sustain the same; while, on the other hand, Arthur Quick testified on the trial that the judgment had never been paid. The court and jury found that such a payment had been made in February, 1877. The supposed payment was as follows: In 1872, which was prior to the time when Huntoon & Son became embarrassed, Joel Huntoon sold four lots to Abraham Warren, on credit, and entered into a written contract with Warren to convey such lots to Warren whenever the purchase-price therefor should be paid. On February 13, 1877, Warren assigned this contract to Quick, and Quick took possession of the property. Afterward, Quick sold his interest in the lots to George M. Hammel; and it is now claimed by the Huntoons that Joel Huntoon paid Quick's judgment by releasing to Quick the purchase-price still remaining due on these lots. There is no writing, however, that shows that such judgment has ever been paid. No deed or written transfer of the lots has ever

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been made by Huntoon to Quick or to Quick's assignee. Quick never delivered the written contract between Huntoon and Warren to Huntoon. No entry of satisfaction or payment of the judgment has ever been made. No receipts were ever given, nor have any passed between Huntoon and Quick. No notice of the payment was ever given to the other judgment creditors. And, indeed, nothing has ever occurred aside from said conversations that would tend to show that the judgment has ever been paid. After this supposed payment, and on August 17, 1878, Joel Huntoon & Son filed a petition in the United States district court for the district of Kansas, asking that they might be adjudged bankrupts, and be finally discharged as such under the laws of the United States, and connected with this petition they filed a schedule, sworn to by each of them, showing that Quick's judgment had not been paid, but was still a valid and subsisting judgment.

Now, notwithstanding all these facts and circumstances, which tend to disprove the findings of the court below and the jury that the judgment in favor of Quick had been previously paid, still there was sufficient evidence to sustain the finding of the court and jury; and we shall therefore decide this case upon the theory that Quick's judgment had in fact been paid prior to the sheriff's sale. This, however, cannot materially affect the substantial rights of the other judgment creditors. They must not suffer because of the supposed fraud of Quick. They had no knowledge that the judgment was paid. Joel Huntoon & Son had. No satisfaction of Quick's judgment had ever been entered of record to give them notice, yet Joel Huntoon & Son had knowledge of such payment. No notice of the payment had ever been given by the Huntoons or by anyone else to the judgment creditors; and there was no written evidence in existence tending to show that Quick's judgment had ever been paid; and even Quick himself did not believe that it had been paid. Why did not the Huntoons protect themselves and the judgment creditors against Quick's judgment, if he committed a fraud? The Huntoons could have appeared in court at the time of the confirmation

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and prevented the payment of any of the proceeds of the sale in satisfaction of Quick's judgment; but they did not do so. Under the circumstances, the judgment creditors, other than Quick, cannot be required to suffer because of Quick's supposed fraud. This fraud, or supposed fraud, cannot of itself and alone render the sale void. The sale was made upon other judgments as well as upon Quick's judgment; and the only effect that this supposed fraud, taken alone, could have upon the sale would be to deprive Quick of any of the proceeds of the sale, and to give all the proceeds to the other judgment creditors.

VIII. It is also claimed that the Mastin Bank judgment was dormant at the time of the sale, but this is not true; and upon this point the findings of the court below are against the plaintiff below, defendant in error. It is true that no execution had been issued on the Mastin Bank judgment for more than five years prior to the date of the execution upon which the property in this case was sold; but the Mastin Bank was a party to the action brought by the Capital Bank against the Huntoons and their judgment creditors within less than five years after the Mastin Bank judgment was rendered, and therefore such judgment was not dormant at the time of the sale. (*Kothman v. Skaggs*, 29 Kas. 5, 17, 18.)

IX. It is further claimed that the Topeka Bank was not a party to the Capital Bank suit until after the judgment of February 12, 1876, subjecting the lots to the payment of the judgment creditors' claims, had been rendered. This claim will not necessarily defeat or avoid the sheriff's sale, but at most can only have the effect of preventing the Topeka Bank from participating in the distribution of the proceeds of the sheriff's sale. We do not think that it can even have this effect. From anything appearing in the case, the right of the Topeka Bank to participate in such proceeds was equal to the rights of the most favored of the other judgment creditors, and the decision of the court below was that it had the right to so participate; and none of the judgment creditors are complaining. It can make no difference to the Huntoons whether

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the Topeka Bank participates in the proceeds of this sale, or not, for they are all liable to pay the Topeka Bank judgment as well as the other judgments.

X. Having considered separately all the points made by the defendant in error, plaintiff below, we shall now proceed to consider them collectively; for collectively they make a much stronger case in his favor than they do when considered separately. The lots were in fact sold for a grossly inadequate price—only about one-fourth of their actual cash value; and eight of them were sold, in violation of law, at less than two-thirds of their appraised value; and the appraisement itself had been made more than four years prior to the sale, and at a time when the price of the property was very low. All were sold to one individual, Arthur Quick, who was the agent of all the judgment creditors; and but few bids were made except such as were made by him; and probably the arrangement among the judgment creditors that he should bid for them had a tendency to prevent their bidding for themselves; and the sale was made in part to pay a judgment which had previously been paid. Now probably, while not one of these things would in and of itself be considered as sufficient to render the sale as to all the lots void, or require that the sale should be set aside in this action as to all the lots, yet, taking all these things together, we are inclined to think that they are sufficient to authorize the setting aside of the sale as to all the lots which still remain in the hands of the judgment creditors and have not been sold or transferred by them to innocent purchasers. None of the aforesaid eight lots have passed out of the hands of the judgment creditors. All that any one of the judgment creditors is really entitled to receive or have is the amount of his or its judgment, with interest. Anything more is injustice. And if the sale in the present case is to be sustained and upheld, the judgment creditors will get very much more than their judgments and interest. On the other hand, the judgment debtors are entitled to a fair and reasonable compensation for their lots. This they have not obtained by the sale. As they pay interest on the judgments

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against them, they should be entitled to the rise in the market value of their lots. This they have not obtained. Therefore, while gross inadequacy of price will seldom if ever alone authorize the setting aside of a sheriff's sale, yet, taking into consideration all the circumstances of this case, the gross inadequacy of price, the illegality of the sale of eight of the lots, the fact that the sale was made at such a remote period of time from the time when the appraisal was made, the fact that by reason of the agreement of the judgment creditors there was substantially only one bidder at the sale, and the further fact that the lots were bid in in part to pay a judgment which had already been paid, we think there are sufficient reasons for setting aside the sheriff's sale to the extent which we have heretofore suggested.

XI. If it be asked, why should not the sale be wholly set aside? it may be answered that it is certainly very doubtful, under the circumstances of this case and in this proceeding, whether the sale should be set aside at all or to any extent, except as to the eight lots which were sold for less than two-thirds of their appraised value. Huntoon, the defendant in error, plaintiff below, had full knowledge of the sale, yet he did not resist the sale or its confirmation, or the execution of the sheriff's deed. He made no motion to set aside the sale, nor did he ever question the regularity or the validity of the sale, or the confirmation thereof, or the sheriff's deed, either in the district court or in the supreme court, or indeed in any court, until he commenced this action in the district court more than a year after the sale and a long time after the confirmation and the execution of the sheriff's deed and the execution of the deeds from Quick to the judgment creditors. Huntoon has been guilty of *laches*, and yet he now appeals to a court of equity to obtain what he might have obtained *in the ordinary course of law* if he had exercised proper diligence. We think too many complications have arisen by reason of his *laches* and negligence, to grant him all that he now asks. (See the authorities heretofore cited, and especially *Prather v. Hill*, 36 Ill. 402; *Noyes v. True*, 23 id. 503; *Van-*

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duyne v. Vanduyne, 16 N. J. Eq. 93; *Daniel v. Modawell*, 22 Ala. 365.) Indeed, the court below did not set aside the sale at all; nor did it intend to set aside the sale any further than we have suggested that it should be set aside. The court below, however, required that as to the lots sold to innocent purchasers a credit should be entered upon the judgments equal to the full value of the lots as of November 1, 1881. Why that date should have been selected, we do not know, as the sale was made on October 18, 1880, the confirmation was had on December 18, 1880, the sheriff's deed was executed on March 1, 1881, and this action was commenced on November 22, 1881. Also, as the law permits the property to be sold on execution for two-thirds of its appraised value, why should the judgment creditors be charged with the full value of the lots? But still we do not think that we need to consider these questions; for, as Huntoon unreasonably neglected to resort to any of the ordinary remedies open to him, and unnecessarily waited until all these and other complications had arisen, we do not think he is now and in this action entitled to any relief with respect to the lots sold to innocent purchasers. It is seldom that equity will assist a person who has been guilty of *laches*, or who has neglected to resort to the ordinary remedies open to him.

XII. And in setting aside the sale as to the lots remaining in the hands of the judgment creditors, justice and equity should be done to them. A party who seeks equity should be willing to concede equity to others. It does not appear that the judgment creditors have made any improvements on any of the lots purchased by them, but it does appear that they have paid taxes thereon; and these taxes should be provided for. The order setting aside the sheriff's sale, if such an order be made, should be upon the condition that all taxes which have been paid by the judgment creditors on the lots which are still in their hands shall be refunded to them before their judgments shall be considered as satisfied. If the judgments are not paid without sale, and the lots are again sold, then, after paying the costs, these taxes should be first

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paid out of the proceeds of the sale. What we have said with regard to taxes has reference to the tax-sale certificates and tax titles held by J. R. Mulvane, which were paid by the judgment creditors, and also the taxes which they have subsequently paid. The statutes require that whenever real estate is sold at judicial sale the court shall order all taxes thereon to be paid out of the proceeds of such sale. (Comp. Laws of 1879, ch. 107, art. 9, § 56; *Brown v. Evans*, 15 Kas. 88; *Opdyke v. Crawford*, 19 id. 604, 608.) And certainly equity and justice require that the taxes in the present case should be paid by the judgment debtors, or be paid out of the proceeds of the sale of the lots, if such sale is made.

XIII. We suppose a part of a record will generally prove what it purports to prove, but as was said in the case of *Haynes v. Cowen*, 15 Kas. 637, 641, 642:

“It cannot prove more than it purports to prove. No liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding deficiencies or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record.”

We think no material error was committed in permitting portions of the record of the case of the Capital Bank against the Huntoons and the judgment creditors to be introduced in evidence. But evidently these portions of the record failed to prove much that the record would have proved if the entire record had been introduced in evidence. For this reason the nineteenth finding of the court below is hardly sustained by sufficient evidence, though really no point has been made in this court upon that finding.

This case will be remanded to the court below, with the order that the judgment rendered therein be modified, and for further proceedings in accordance with the views expressed in this opinion.

All the Justices concurring.

THE STATE OF KANSAS V. HENRY H. BUDGETT.

1. **SCHOOL LAND**—*No Vested Right, When.* Settlement and improvement upon school lands under the provisions of § 4, art. 14, ch. 122, Laws of 1876, with a view to purchase the same for the appraised value thereof, exclusive of the value of the improvements, do not confer a vested right in the land so settled upon.
2. **INCHOATE RIGHT, Nature of.** This inchoate right, if the settler be otherwise qualified, gives the occupant a privilege or preference as against the purchase of the land by others, but confers no legal or equitable right against the state.
3. **SCHOOL LAND**—*Compliance with Statute before Purchase.* Where a person, six days before ch. 152, Laws of 1886, was approved, settled upon and improved a quarter-section of school land, by constructing a sod house and breaking five acres, and two months after said chapter 152 took effect, filed his petition setting forth that he had fully complied with the provisions of art. 14, ch. 122, Laws of 1876, and asking under the provisions of that act to purchase at its appraised value, exclusive of the value of the improvements, the land so settled upon by him, *held*, that before the petitioner is entitled to purchase the land at its appraised value, he must comply with all the prerequisites of said ch. 152—that law being the one in force at the time he presented his petition to the probate court.

Error from Meade District Court.

THE defendant in error, *Budgett*, on February 13th, 1886, being a citizen of the United States and of the state of Kansas, made actual settlement upon, and improved thereafter the southeast quarter of section thirty-six, township thirty-two, range twenty-nine, west, in Meade county, and resided continuously thereon until the 13th day of April, 1886. The improvements made by him were appraised in the manner prescribed by law, at two hundred dollars. On the 13th of April Budgett made application to the probate judge of that county to purchase the land described, under and by virtue of the statute of 1876 relating thereto. The county superintendent of public instruction objected to the sale, for the reason, among others, that the petitioner had not resided thereon six months, and that he had previously purchased school land to the amount

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of one quarter-section. The probate judge decided against Budgett, who appealed to the district court, and upon the trial there, on April 20, 1886, judgment was rendered in his favor. This judgment *The State* brings here for reversal.

Samuel Lawrence, county attorney, and *S. B. Bradford*, attorney general, for *The State*.

Webb & Spencer, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: On April 13, 1886, Budgett filed his petition before the probate judge of Meade county—a county organized November 4, 1884—to purchase a quarter-section of land in that county, under the provisions of article 14, ch. 122, Laws of 1876.

It appears in the record that when Budgett filed his petition, he had resided upon the land only two months, and that prior to filing his petition he had taken a quarter-section of school land under the provisions of the act of 1876. On February 19, 1886, ch. 152 of the Laws of 1886 took effect. This act amended § 4 of article 14, ch. 122 of the Laws of 1876, and required the petitioner, before being permitted to purchase school land at the appraised value thereof, to have settled and actually resided upon the land continuously for the period of six months. The act further provides—

“That any person who has purchased school land to the amount of one quarter-section under the provisions of the act of which this act is amendatory, or who may hereafter purchase school land to the amount of one quarter-section under the provisions of this act, shall not again be permitted to purchase school land under the provisions of this act.”

Budgett claims the land in controversy upon his compliance with the provisions of the law as it stood at the time of his settlement; this upon the theory that he obtained a vested right by this settlement and improvements prior to the passage of ch. 152, Laws of 1886.

The trial court decided that the amendment of ch. 122, Laws of 1876, by the legislature of 1886, did not affect the

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petitioner. In this view we cannot concur. The settlement of Budgett was made only six days before the act of 1886 was approved. His petition, stating that he had settled upon and improved the land, was filed nearly two months after the act of 1886 took effect. Mere settlement and improvement of school land give no vested right, as against the subsequent legislation of the legislature. Such settlement and improvement, if the petitioner is otherwise qualified, give him a privilege or preference as against the purchase by others, but confer no right against the state. (*Wilkie v. Howe*, 27 Kas. 521; *The State v. Stringfellow*, 2 id. 263; *Frisbie v. Whitney*, 9 Wall. 187; *People v. Shearer*, 30 Cal. 645; *Phelps v. Kellogg*, 15 Ill. 131; *Company v. Bryan*, 8 Smed. & M. 234.)

The only way of making the lands granted by the congress of the United States to the state for school purposes available, is by their sale. To accomplish this, certain rules and regulations are necessary. The people, who are the beneficiaries, acting through their legislature, adopted certain terms for the purchase of these school lands in the act of 1876, but these terms have been changed by the act of 1886. Budgett paid no money, nor tendered any money for the land he now claims, prior to the passage of the act of 1886, and he filed no petition to purchase the land until after the act was in full force. He has never received any receipt or certificate of purchase, and his claim rests solely upon his settlement and improvements on the land, consisting of a sod house and five acres of breaking. There is nothing in these acts of his to confer a vested right, or any kind of claim to the land, against the state. If he wishes to purchase the land settled upon by him for the appraised value thereof, exclusive of the value of the improvements, he must comply with all the prerequisites of the law in force at the time he presents his petition to the probate court.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

THE CITY OF MILTONVALE V. S. C. LANOUE.—*In the Matter of the Petition of S. C. LANOUE for a writ of Habeas Corpus.*

1. **ENTIRE JUDGMENT, Suspended by Appeal.** The defendant was convicted first before a police judge, and afterward in the district court, for violating an ordinance of a city of the third class, and he then appealed to the supreme court. The sentence was that "he should pay a fine and the costs of suit, and that he stand committed to the jail of the county until the amount of said fine and costs shall be paid." *Held*, That the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court.
2. **IMPRISONMENT; Order, Not Erroneous.** And further held, in such case, that the order of the district court providing for the imprisonment of the defendant in the county jail, which order is in compliance with § 1 of chapter 84 of the Laws of 1879, (Comp. Laws of 1879, ¶ 943,) is not erroneous, notwithstanding § 66 of the act relating to cities of the third class, and notwithstanding the fact that the ordinance provided for imprisonment in the city jail and not in the county jail.

Appeal from Cloud District Court.—Original Proceedings in Habeas Corpus.

THE opinion states the facts.

L. J. Crans, and *S. D. Houston*, for appellant.

J. W. Sheafor, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: Two cases, arising substantially out of the same facts, have been presented to this court. It appears that on February 12, 1885, a prosecution was commenced before the police judge of the city of Miltonvale, a city of the third class in Cloud county, in the name of the city, and against S. C. Lanoue, for an alleged violation of a city ordinance prohibiting the sale of intoxicating liquors. The com-

plaint contained two counts. The defendant was tried and convicted on both counts, and afterward appealed to the district court, where he was again tried and convicted on both counts; and it was adjudged that—

“He pay a fine of \$100 on the first count in said complaint, and a fine of \$100 on the second count in said complaint, and the costs of this prosecution, taxed at \$281.20, and that he stand committed to the jail of Cloud county, Kansas, until the amount of said fine and costs shall be paid; and hereof let execution issue.”

The defendant then appealed to the supreme court, and completed his appeal on July 21, 1886, by filing in the supreme court a transcript of the proceedings of the courts below. On July 27, 1886, the defendant applied to the supreme court for a writ of *habeas corpus*, alleging that he was unlawfully restrained of his liberty by Edward Marshall, sheriff of Cloud county, Kansas, in pursuance of the foregoing judgment and order. The writ of *habeas corpus* prayed for was allowed and issued, and the sheriff made a return thereof, admitting that he restrained the defendant of his liberty in pursuance of said judgment and order up to July 27, 1886, when he released him from his custody, in pursuance of an order from the supreme court.

The defendant now claims, (1) that the court below erred in ordering that he be committed to the county jail, and indeed he claims that the court below had no jurisdiction to make any such order; and he further claims, (2) that even if the court below had jurisdiction to make any such order, and even if the order when made was valid and proper, still that when the defendant appealed to the supreme court, the appeal had the effect to suspend such order, and indeed to suspend the entire judgment of the district court pending the appeal, and that the defendant was then entitled to be discharged from custody until the appeal should be determined, and finally unless the judgment of the district court should be affirmed.

We shall consider the last question first. We think the defendant is entitled to be discharged from custody pending his

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1. Entire judgment, suspended by appeal.

appeal in the supreme court. We have previously had occasion to examine this question, and have decided it in other cases, although no written opinion has ever before been delivered. Where the payment of a fine and the costs of suit are imposed upon the defendant, it is always the duty of the trial court to order "that the defendant stand committed to the city prison, or the jail of the county in which the judgment is rendered, until the judgment is complied with." (Laws of 1879, ch. 84, § 1; Comp. Laws of 1879, ¶ 943. See also Crim. Code, § 251; also Comp. Laws of 1879, ch. 83, ¶ 4876.) And always where an appeal is taken in such a case, the judgment itself with regard to the fine and costs is suspended pending the appeal. (*The State v. Volmer*, 6 Kas. 379, 384.) Indeed it is a general rule that an appeal suspends the judgment or order appealed from, and everything connected therewith, unless the statute in express terms or by the clearest of implications provides otherwise; and there is no statute providing otherwise in the present case. In an ordinary criminal prosecution, where imprisonment is imposed upon a defendant as a part of the punishment, then the statute provides that there shall be no stay of the execution of the judgment pending the appeal. (Crim. Code, § 287) But there is no statute providing that there shall be no stay where the judgment imposes only a fine and costs. Hence a judgment imposing only a fine and costs must be stayed pending an appeal. And if the judgment for the fine and costs is to be stayed, it would seem to follow that all incidents thereof, all judgments or orders having for their object merely the enforcement of the judgment for the fine and costs, should also be stayed or be suspended pending the appeal. And clearly, we think, such is the case.

The imprisonment fixed by the trial court in cases of this kind is not for the purpose of punishment, but like the issuing of an ordinary execution, is resorted to merely as a means of enforcing the judgment for the fine and costs. (Comp. Laws of 1879, ch. 19a, ¶¶ 928, 943, 944; *In re Boyd*, 34 Kas. 573.) Now if the imprisonment in cases of this kind

City of Miltonvale v. Lanoue.

is resorted to only for the purpose of enforcing the judgment for the fine and costs, and if the judgment for the fine and costs is suspended pending the appeal, it would be improper during such suspension to imprison the defendant, or to issue an execution against him. It would be improper to imprison him for the purpose of requiring him to do something which for the time being he is not required to do. It would be improper to imprison him for the purpose of requiring him to pay a fine or costs when for the time being he could not legally or properly be required to pay the same. But if he should pay the fine and costs for the purpose of avoiding the imprisonment, then what would become of his appeal? From the time of such payment his appeal would be valueless. Pending the appeal in the supreme court, we think the entire judgment is suspended—that with regard to the imprisonment, as well as that with regard to the payment of a fine or costs. The doubt expressed in the case of *In re Chambers*, 30 Kas. 455, was there inserted in deference to the opinion of an able and learned district judge of this state; but after a careful examination of the entire question, we are of the opinion that there is not much room for such doubt.

The only other question presented in this case is, whether the court below erred in ordering that the defendant be committed to the county jail of Cloud county until the fine and costs adjudged against him should be paid. We do not understand that it is claimed by the defendant that the ordinance under which the defendant was convicted and sentenced is invalid or void; indeed, we think he admits that it is valid; and that it is valid we would refer to the case of *Franklin v. Westfall*, 27 Kas. 614. But the defendant claims that there was no authority for the court below to commit the defendant to the county jail; that if there was any authority to commit him at all, it was to the jail of the city of Miltonvale, and not to the jail of Cloud county. Now this is a question of but slight importance; for if the court below had the power to commit the defendant to the jail of the city, and not to the jail of the county, then we could order that the judgment of

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the court below be modified and corrected to that extent; but is not the judgment of the court below correct? It is true that § 66 of the act relating to cities of the third class, which took effect April 3, 1871, provides among other things that cities of the third class shall have the power to pass ordinances for the confinement of persons in the city prison who may fail to pay fines, forfeitures, etc., and does not mention the county jail. (Comp. Laws of 1879, ¶ 928.) And it is also true that the ordinance under which the defendant was convicted provided for the imprisonment of violators of the ordinance in the city jail, and did not provide for imprisonment in the county jail. But § 1 of chapter 84 of the Laws of 1879, which amends chapter 81 of the act relating to cities of the third class, and which took effect on *March 15, 1879*, provides, as already stated, that in cases of this kind "it shall be part of the judgment that the defendant stand committed to the city prison *or the jail of the county* in which the judgment is rendered until the judgment is complied with." From this section it clearly appears that the court in rendering the judgment has a discretion whether to commit the defendant to the city prison, or to commit him to the county jail; and this statute, being the last expression of the will of the legislature upon the subject, must govern; and we do not think that the city or the city council has the authority by ordinance or otherwise to take away this discretion from the court trying the cause. Besides, it does not appear that there was any city jail in existence at Miltonvale at the time the judgment in this case was rendered. From anything appearing in the case, there may not have been any such city jail; or if there was, then it may not have been in a suitable condition for the confinement of prisoners in it. In all probability, the court below exercised a proper judicial discretion in committing the defendant to the county jail, and therefore we cannot reverse or modify its judgment because of any supposed abuse of judicial discretion.

In the case brought to this court on appeal, the judgment of the court below will be affirmed.

2. Imprisonment; order not erroneous.

The State v. Wahl.

In the *habeas corpus* case it is adjudged in favor of the defendant that the imprisonment from July 21, 1886, to July 27, 1886, was illegal, and that from July 21, 1886, up to the present time the defendant has been entitled to his liberty; but, as the defendant's appeal has now been determined and adjudicated against him, his right to his liberty has also terminated. From this time on, until the fine and costs shall be paid, any imprisonment to enforce the payment of such fine and costs may be legal. The defendant will be remanded to the custody of the sheriff until such fine and costs are paid.

All the Justices concurring.

THE STATE OF KANSAS V. LEWIS WAHL.

NUISANCE—*Insufficient Complaint.* A complaint filed under § 319, of ch. 31, Comp. Laws of 1879, which charges the defendant with putting "the part of a carcass of any dead animal into any river, creek, pond, road, street, alley, lane, lot, field, meadow, or common," but which does not substantially allege that the act of the defendant complained of resulted to the injury of the health or to the annoyance of the citizens of the state or any of them, is insufficient, and a motion to quash such complaint should be sustained.

Appeal from Dickinson District Court.

PROSECUTION under § 319 of the crimes act. The defendant, *Lewis Wahl*, filed a motion to quash the complaint, which motion the court overruled at the May Term, 1886. This ruling the defendant brings here.

J. R. Burton, for appellant.

S. B. Bradford, attorney general, for The State; *Edwin A. Austin*, of counsel.

The opinion of the court was delivered by

JOHNSTON, J.: The appellant was charged and convicted before a justice of the peace of a violation of § 319, ch. 31, Comp. Laws of 1879. He appealed to the district court, and was there tried upon the original complaint. A motion to quash the complaint was made by the appellant, and overruled, and this ruling is the one complained of here. The language of the complaint, omitting the caption and verification, is as follows:

"Alfred W. Rice, of lawful age, being first duly sworn, on oath says, that on the 1st day of December, 1885, in the county of Dickinson and state of Kansas, one Lewis Wahl, then and there being, did then and there unlawfully put a part of the carcass of a dead animal into a certain stream of water then and there commonly known as Mud creek; contrary to the form of the statute in such cases made and provided."

It is contended that as the affidavit failed to state that the act charged against the appellant resulted to the injury of the health or annoyance of the citizens of the state, it did not state a public offense. The language of the section upon which the affidavit was founded is as follows:

"If any person or persons shall put any part of the carcass of any dead animal into any river, creek, pond, road, street, alley, lane, lot, field, meadow, or common; or if the owner or owners thereof shall knowingly permit the same to remain in any of the aforesaid places, to the injury of the health or to the annoyance of the citizens of this state, or any of them, every person so offending shall, on conviction thereof before any justice of the peace of the county, be fined in any sum not less than one dollar nor more than twenty-five dollars; and every twenty-four hours during which said owner may permit the same to remain thereafter, shall be deemed an additional offense against the provisions of this act." (Comp. Laws of 1879, ch. 31, § 319.)

For the state it is claimed that the first clause of the section states an offense, and that the subsequent phrase "to the injury of the health, or to the annoyance of the people of the state," has no reference to that clause, and does not qualify it. The

section is somewhat bunglingly drawn, and some room is given for the interpretation placed upon it. According to that view, however, any person placing the smallest part of the carcass of any dead animal in his own field containing hundreds of acres, and where the public could not in the least be affected by it, and who allowed it to remain there but a few minutes, would commit a crime. We cannot infer that the legislature intended an absurdity. Many acts of putting a diminutive portion of some carcass into an alley, lot, field, road, or common, can be thought of, which would not, in their nature or consequence, affect the public in the slightest degree. Unless the act produces a material annoyance, discomfort or injury to the public, it would not amount to a public nuisance. The whole purpose of the act in which the section is found is manifestly to define what acts and omissions shall constitute a public nuisance, and to provide penalties therefor. In construing the statute, the real intent and meaning of the law-makers should prevail over the literal sense, where there is any inconsistency. We cannot say that a mere point of punctuation shall defeat the legislative will, where the title and the context of the act so clearly disclose that the purpose is to prevent and punish public nuisances. Reading the section in that light, and with a view to effectuate that purpose, the phrase, "to the injury of the health, or to the annoyance of the citizens of this state," must be held to be a qualification of the first clause. If, therefore, any person shall put any part of the carcass of any dead animal into any river, creek, pond, street, alley, lane, lot, field, meadow, or common, to the injury of the health or to the annoyance of the citizens of this state, or any of them, or if the owner of such carcass shall knowingly permit the same to remain in any of the aforesaid places, to the injury or to the annoyance of the citizens of this state, or any of them, he would be guilty of a public offense, and subject to the penalties prescribed in the section; but there is no criminal liability for a nuisance where there is no such result. As the complaint failed to allege that the act of the appellant complained of resulted to the injury of the health,

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or to the annoyance of any of the citizens of this state, it is insufficient, and the motion to quash should have been sustained.

The judgment of the district court must therefore be reversed, and the cause remanded with directions to sustain the appellant's motion.

All the Justices concurring.

J. B. BILLARD V. JOSEPH ERHART, *et al.*

INJUNCTION, *When Not a Matter of Right.* The owner of a lot in a city is not entitled, as a matter of right, to an injunction against a party from obstructing a sidewalk or street in such city, where the owner's lot or land does not abut upon and is not opposite or contiguous to the obstruction, since the injury or nuisance complained of is not different in kind from that sustained by the public.

Error from Shawnee District Court.

ON September 10, 1885, *Joseph Erhart, W. S. Gordon, — Rosen, and Mrs. Pushaw*, filed their petition against *J. B. Billard*, alleging that—

“They and each of them are citizens of the city of Topeka, in said county; that they and each of them own real estate, and reside respectively upon their said real estate, which said real estate and the residences of plaintiffs respectively are situate upon ‘A’ street, (formerly Curtis street,) in said city, in the first ward thereof, usually called North Topeka; that said defendant J. B. Billard is the proprietor of, and runs and operates a certain mill, situate upon said ‘A’ street, at the intersection of said ‘A’ street with Kansas avenue; that said Kansas avenue is the principal thoroughfare of said city, and in order to reach almost every portion of said city it is necessary for plaintiffs and each of them to pass from their said residences upon and over said ‘A’ street to and upon said Kansas avenue; that adjoining said defendant's mill, and upon said ‘A’ street, is situate a certain scale for weighing; that

35	611
67	70
35	611
676	698

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said scale is so situate in the sidewalk as to constitute and form a portion of said sidewalk, and occupies the entire width of said sidewalk, and extends a considerable distance lengthwise upon said sidewalk; that said defendant for a long time prior to the commencement of this action, has been and still is in the habit of using said scale by driving and causing to be driven upon said scale and sidewalk, teams attached to wagons, and by weighing upon said scale wagons laden with grain, flour, etc., and said defendant thus uses and appropriates said sidewalk by causing teams and wagons thus to stand upon said scale and sidewalk, and occupying said sidewalk with teams, both upon this portion occupied by the scale and other portions of said sidewalk contiguous thereto, thereby entirely obstructing said sidewalk almost continuously during the business hours of the day, and rendering it impossible for pedestrians to pass along and upon said sidewalk.

"And plaintiffs say that said 'A' street is a public street and highway, and that their said property and residences abut thereon, and by reason of said obstructions caused by the defendant as heretofore set forth, they are and each of them is impeded, hindered and delayed continually, and their free use of said 'A' street is defeated and prevented, to their constant annoyance and injury, whereby they are and each of them is greatly damaged; that said damage is of a character not reasonably computable or repairable in money, and constantly recurring, and would be the subject of innumerable actions at law.

"And plaintiffs say that by reason of said obstructions, the value of their real estate and of that of each of them abutting upon said 'A' street, as aforesaid, is greatly diminished and lessened, and they are denied thereby the tranquil enjoyment of their homes, and the continuous obstruction of said sidewalk by said defendant is a continuing nuisance to these plaintiffs, and an interference and abridgment of their rights as residents and tax-payers of said city, whereby plaintiffs and each of them have sustained and will sustain irreparable damage; and for the injuries thus sustained, and the wrongs thus perpetrated upon and against them by said defendant, plaintiffs say that there is no adequate remedy at law.

"Wherefore, plaintiffs pray that a temporary injunction issue, restraining said defendant from further obstructing said sidewalk and from keeping or causing horses or wagons to stand thereon, either for weighing upon said scale or for loading or unloading grain, until this cause can be finally heard

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and determined; and that upon the final hearing hereof said injunction be made perpetual. And plaintiffs pray judgment for costs, and all proper relief."

Upon the day of filing their petition, the district judge of Shawnee county granted a temporary injunction as prayed for in the petition, upon the condition that the plaintiffs execute to the defendant an undertaking in the sum of three hundred dollars. Subsequently, this undertaking was properly executed and filed. At the September Term, 1885, of the district court, the defendant demurred to the petition upon the ground that it did not contain facts sufficient to constitute a cause of action. This demurrer was overruled, defendant excepting. He brings the case to this court.

Waters & Chase, and W. P. Douthitt, for plaintiff in error.

Overmyer & Safford, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: The plaintiff in error, Billard (defendant below), is the owner of a mill located at the corner of Kansas avenue and "A" (formerly Curtis) street, North Topeka. For several years there has been a scale for weighing located upon the sidewalk of "A" street, near the corner, for the use of the mill. Doors were arranged along the north side of the mill, also on "A" street, east of the scale, for loading and unloading from wagons, grain and other commodities. Erhart and the other plaintiffs below filed their petition asking that Billard and all persons acting for him be enjoined from using the scale, and from permitting wagons to stand upon the sidewalk for the purpose of loading or unloading grain, etc. The petition was demurred to upon the ground that the plaintiffs were not shown to have any interest in, or to have suffered any loss or injury by the acts complained of, different from the public generally, and that the petition showed affirmatively upon its face that they had no special loss, and therefore that as plaintiffs they had no capacity to bring the action. This demurrer was overruled, and the defendant excepted.

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In *Mikesell v. Durkee*, 34 Kas. 509, it was held that where a person or corporation attempts to construct a purely private railroad upon any of the public streets of a city, any abutting lot-owner whose property is or may be injured thereby, may maintain an action to perpetually enjoin such person or corporation from making such use of the streets.

In *Heller v. Railroad Company*, 28 Kas. 625, it was decided that where a part of a street is attempted to be vacated, and the owners of lots abutting thereon do not complain, the owner of a lot in another block in front of whose lot the street is left its full width, and access to whose lot is in no respect disturbed or abridged, cannot maintain an action to restrain the vacation, although thereby the general course of travel will probably be thrown on some other street and no longer pass in front of said lot-owner's property.

The question is, by which of these decisions the present case is to be governed? Upon the whole, we are satisfied that this case falls within the principles decided in *Heller v. Railroad Company*, supra. The difference in facts does not place them upon any different ground of principle. The obstruction complained of is not in front of the lots owned by the plaintiffs below, and their property is not opposite or contiguous to the obstruction. The case therefore differs from *Mikesell v. Durkee*, as in that case the defendants were attempting to excavate and build a private railroad in a public street in front of the plaintiff's lots. In *Heller v. Railroad Company*, the plaintiff alleged that the railroad company was occupying a portion of the street which the city council had attempted to vacate, and was commencing to lay tracks and erect buildings thereon; that thereby the travel was diverted from plaintiff's property, and if the vacation of the street was permitted, that the property would cease to be of any value for business purposes, and of small value for residence purposes. In that case we said:

"The fact that as an indirect consequence injuries may result, gives no cause for interference. Only when the injury is direct, when the individual suffers some special wrong,

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something different from that experienced by other members of the community, may the party injured challenge the action. It is not always easy to draw the dividing-line between those cases in which the injury is direct and special, and those in which it is indirect and general. . . . The closing up of access to the lot is the direct result of the vacating of the street, and the owner, by the loss of access to his lot, suffers an injury which is not common to the public; but in the case at bar, access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is, that by the vacating of the street away from the lots, the course of travel is changed. But this is only an indirect result. There is nothing to prevent travel from coming by the lots if the travelers desire it. The way to the heart of the city by the lots is a little more remote than it was before, but still free passage is open to all who wish to pass thereby. No one is compelled to stay away. Access to the lots is the same that it was before, so that the injury is only the indirect result of the action complained of, and it is an injury which, if it exists at all, is sustained by all other lots along the street west of the parts vacated."

In this case the property of the plaintiffs below abuts on a part of the street distant from the alleged construction, and the damage they suffer is sustained by the public generally. (High on Injunctions, 2d ed., §§ 594, 827; id., § 819, and cases cited; *Williams v. Smith*, 22 Wis. 594, and cases cited; *Shaubut v. Railroad Company*, 21 Minn. 502; *Craft v. Jackson, Co.*, 5 Kas. 521; *Bobbett v. The State, ex rel.*, 10 id. 15.)

The judgment of the district court will be reversed, and the case remanded for further proceedings, in accordance with the views herein expressed.

All the Justices concurring.

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J. B. BILLARD V. JOSEPH ERHART, *et al.*

ERRONEOUS INJUNCTION, *Valid until Dissolved.* Where the district court has jurisdiction of the parties and of the subject-matter, the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been properly dissolved.

Error from Shawnee District Court.

UPON the application of *Erhart* and others, plaintiffs in the preceding cause, the district judge granted a temporary injunction therein, to restrain the defendant, *Billard*, from committing the acts complained of in their petition. On March 27, 1886, the plaintiffs moved the district court to require the defendant to show cause why he should not be punished for contempt of court for violating the injunction aforesaid; and the court, having heard the evidence, found the defendant guilty, and adjudged that he pay a fine of \$100, and the costs of the proceeding. *Billard* brings this judgment here for review.

Waters & Chase, and *W. P. Douthitt*, for plaintiff in error.

Overmyer & Safford, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: It is immaterial in this case, whether the proceeding be called a civil or a criminal one. The record is singularly defective. The certificate to the record is as follows:

"STATE OF KANSAS, SHAWNEE COUNTY, ss.: I, B. M. Curtis, clerk of the district court within and for the county and state aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of the pleadings and record entries in the above-entitled cause as the same appear on file and of record in my office.

"Witness my hand and the seal of said court hereunto affixed, at my office in the city of Topeka, this 17th day of April, 1886. [Seal.] B. M. CURTIS, *Clerk.*"

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Even if we treat the record as a certified transcript, we cannot pass upon all of the alleged merits of the case. The petition in error alleges that the judgment, rulings and decisions of the trial court are contrary to law, and are not supported by the evidence. The record purports to contain a copy of the bill of exceptions, but it does not clearly appear that this bill was ever filed with the papers in the case. Treating the bill as properly filed, it is incomplete within the decision of *Railroad Co. v. Wagner*, 19 Kas. 335.

The bill of exceptions of December 10, 1885, referred to in the bill of exceptions contained in the record as having been introduced as evidence in the case, is not inserted in or attached to the record, and is in no way identified. We therefore cannot say what evidence was considered by the district judge. There are other defects in the bill of exceptions, but those noted are sufficient.

It appears from the record that a temporary injunction was granted September 10, 1885. This injunction was never dissolved, and on March 27, 1886, Billard was adjudged in contempt for violating the injunction and adjudged to pay for his disobedience the fine of one hundred dollars, together with all costs. The court had jurisdiction of the parties and of the subject-matter, and the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been dissolved. (Civil Code, § 247; 2 High on Injunctions, 2d ed., p. 921, § 1416.)

The judgment of the district court will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. WILLIAM SMITH.

1. **VERDICT, When Not Set Aside.** Where the testimony offered by the state, when taken alone, is competent and sufficient to sustain the prosecution, a verdict which has been approved by the district court will not be set aside in the supreme court for insufficiency of the evidence.
2. **NEW TRIAL, No Ground for.** As a general rule, newly-discovered evidence the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial.
3. ——— **Inadmissible Evidence.** The declarations of a party other than the defendant which formed no part of the *res gesta*, although they may amount to an admission that he committed the offense charged against the defendant, are not admissible in evidence in behalf of the defendant, and an application for a new trial based on such evidence was properly refused.
4. ——— **Evidence Sustains Charge.** Evidence examined, and held to be sufficient to sustain a charge of assault.

Appeal from Brown District Court.

PROSECUTION for an assault with intent to kill. Trial had in October, 1885, when the defendant *Smith* was convicted of an assault only, and sentenced to pay a fine of \$100 and the costs of the prosecution, and to be committed to the jail of Brown county until the sentence was complied with. The defendant appeals.

C. W. Johnson, for appellant.

S. B. Bradford, attorney general, for The State.

The opinion of the court was delivered by

JOHNSTON, J.: William Smith was charged with having, on January 31, 1885, beat and assaulted Samuel Snyder with a pistol with intent to kill him, and at a trial had in October, 1885, he was convicted of a simple assault. He appeals, and urges several objections to the conviction, the first of which is that the verdict is not supported by the evidence. We have

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looked into the evidence, and are of the opinion that the objection is not tenable. If the jury believed the witnesses for the state, they could do no less than convict. That an assault was made upon Snyder at the time charged, was practically conceded in argument, and cannot be doubted. He states that he went out in the dusk of the evening to do chores, and as he came out of his barn he was assailed by the defendant, who struck him, caught him by the whiskers, then drew a pistol or revolver and pointed it at him, when Snyder cried out in a loud voice, "Oh! oh! Bill," and the defendant then ran away. There is also testimony that for some time previous, the defendant entertained an ill feeling toward Snyder. It is also agreed that the defendant, in company with another young man, traveled along the road near Snyder's barn about the time of the assault. Another witness for the state claims to have seen the defendant and his companion leave the road and go toward the barn, and that very soon afterward the outcry by Snyder was heard. Then there was the correspondence of the tracks in the snow with the shoes worn by the defendant, and some other circumstances corroborative of Snyder's testimony. Of course there was testimony given in behalf of the defendant strongly contradictory of that offered by the state. The defendant and his companion, while admitting that they passed by Snyder's on the evening of the assault, flatly deny leaving the road or going upon Snyder's premises, or that the assault was made by defendant. Some other testimony was offered, tending to show that Snyder was mistaken as to the identity of the person who assaulted him. But the credit of the witnesses, as well as the conflict of the testimony, have been settled by the jury. The testimony of the state, taken alone, was clearly competent, and sufficient to sustain the verdict; that verdict has been approved by the trial court, and it is well settled that in such a case the verdict will not be disturbed by this court.

1. Verdict, when
not set aside.

Counsel for defendant claims that the result reached by the jury is a "split verdict," and should for that reason be set aside. In his argument he says: "The evidence of one side

The State v. Smith.

or the other is true. If Snyder's is true, no simple assault was committed, but an outrageous battery; if the other, no assault was committed by William Smith; hence the evidence does not sustain the verdict of simple assault." There is testimony, it is true, that the defendant pulled Snyder's whiskers and struck him with a board, but the only battery charged in the information was that the defendant beat Snyder with a pistol or revolver. On cross-examination Snyder said that the defendant did not strike or shoot him with the pistol; hence a mere assault was the highest degree of the offense that was warranted by the testimony under the information, and therefore no compromise of the verdict or prejudice of the jury can be properly inferred.

It is next urged that a new trial should have been granted, on the ground of newly-discovered evidence. Mrs. Morris, a witness for the state, testified that she was standing on her door-step and saw the defendant and his companion jump over the fence and run to Snyder's barn just prior to the assault. By the new evidence it is proposed to show that the testimony of Mrs. Morris was untrue; that she had said at another time that it was so dark she was unable to recognize two men who passed along the road and went to Snyder's barn, and also that the hedge and trees which were standing in front of where she was obstructed her view, so that she could not have seen all she claimed to have witnessed. The testimony of Mrs. Morris was upon a collateral fact, and was only corroborative of the direct evidence of Snyder. Besides, the sole purpose of this new evidence is simply to discredit Mrs. Morris; and the general rule is that evidence of that character does not afford adequate ground upon which to obtain a new trial. (*Parker v. Bates*, 29 Kas. 597; *Wharton's Crim. Prac. and Plead.*, 869, and cases cited.)

There was testimony offered on behalf of the defendant on the trial, tending to show that two men other than the defendant and his companion were seen near Snyder's about the time of the assault. In the affidavits for a new trial, it is said two men, Eugene Brown and Al. Mitchell, returned from the

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town of Robinson to their home, on the evening of the assault, about half-past eight o'clock, and that they acted somewhat excitedly and strangely; and that some time after their arrival one of them made use of the expression, "Oh! oh! Bill, don't." This expression corresponded with the one made by Snyder when he was assailed; but it was made by strangers

3. Inadmissible
evidence.

to this prosecution, about two hours after the assault was made, and at a place somewhat remote from where it occurred, and cannot be regarded as a part of the *res gestæ*. The action of these parties is not necessarily connected with the guilt or innocence of the defendant. Proof of their guilt would not establish the innocence of the defendant; and even if their statement had gone so far as to amount to a confession that they had assaulted Snyder on the evening in question, it would not be competent evidence in behalf of the defendant. Had these parties been upon trial, their acts and declarations as set forth in the affidavits for a new trial would have been competent evidence against them; but as they are strangers to this prosecution, their acts and declarations cannot be admitted in evidence. (*The State v. Duncan*, 6 Ired. 236; *The State v. White*, 68 N. C. 158; *The State v. Bishop*, 1 Am. Crim. Rep. 594.)

Some objections were made to the ruling of the court in the admission of evidence, and also to the instructions that were given, but an examination shows them to be not well taken, and to need no comment.

We find no error in the record, and the judgment of the district court will therefore be affirmed.

All the Justices concurring.

38 622
43 651THE MISSOURI PACIFIC RAILWAY COMPANY V. WILLIAM
B. STEVENS.

1. RAILROAD WHISTLE—*Sounding before Crossing Highway.* It is the duty of a railroad company, in running its trains over its track, to have the whistle of its engines sounded three times, at least eighty rods from the place where the railroad crosses any public highway, except in cities and villages. Where no whistle is sounded, or other alarm given, and damages are sustained by a train of cars running over cattle upon the highway, the company is chargeable with negligence, and it is not relieved from its liability therefor, merely by the evidence of the owner of the cattle, in charge of the same, that he saw the smoke and heard the puffing of the engine drawing the train, more than half a mile from the crossing; because no one is bound to conclude that the engine or train will cross the highway without sounding the whistle three times, at least eighty rods from the crossing.
2. ——— *Regular and Extra Trains; Competent Witness.* Where a person has lived several months on a farm, near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one.

Error from Atchison District Court.

ACTION by Stevens against *The Missouri Pacific Railway Company*, to recover forty-five dollars, the value of a cow alleged to have been killed on September 18, 1883, by the negligence of the company, upon a public highway about three miles southwest of the city of Atchison. Trial had March 14, 1885, before the court with a jury. Verdict for the plaintiff for forty-five dollars. The jury also made the following special findings of fact:

- "1. Was said cow killed at a public crossing? A. Yes.
- "2. Was the whistle blown three times, eighty rods east of said crossing as said train moved west? A. No.
- "3. As soon as the engineer on said train discovered cattle near said crossing, did he at once reverse his engine and use all the power at his command to stop said train? A. No.
- "4. Did the plaintiff know that said crossing was a dangerous one? A. Yes.

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"5. Did plaintiff use ordinary care to prevent his cattle from being run over at the time said cow was killed? A. Yes.

"6. Was said cow killed on September 18, 1883? A. Yes, or near this date.

"7. Did plaintiff have charge of said cow with others at the time of the killing of said cow? A. Yes.

"8. Was the plaintiff driving said cow with others towards said track on the public highway for the purpose of crossing? A. Yes.

"9. Before getting so near to said track that said cow could be controlled, did plaintiff or his employes look up and down the track to see if train was coming? A. Yes.

"10. Before any of said cattle crossed said track, did plaintiff and his employes hear an engine puffing east of there? A. Yes.

"11. Did plaintiff or his employes, after hearing the noise of an approaching engine, drive a portion of said cattle across and over said track? A. No.

"12. Could the plaintiff by the exercise of ordinary care have prevented the collision which resulted in the death of said cow? A. No."

Thereupon *The Railway Company* filed a motion for a new trial, which motion was overruled. Judgment was entered in favor of plaintiff and against the defendant, in accordance with the verdict, and for costs. *The Railway Company* excepted, and brings the case here.

Everest & Waggener, for plaintiff in error.

J. C. Greenawalt, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action brought by William B. Stevens against the Missouri Pacific Railway Company, to recover forty-five dollars as damages for the killing of a cow on September 18, 1883, upon a public highway, about three miles southwest of the city of Atchison. There was evidence before the jury tending to show that the whistle attached to the engine of the train doing the injury was not sounded at least eighty rods from the place where the railway crosses the highway. There was also evidence before the jury tending to show

that one of the persons in charge of the drove of cattle, when about to cross the highway, as the train was approaching, was on the track on horseback, waving his hat; that no attention was paid to this, and no attempt made to slacken the speed of the train, or to prevent it from running into the drove. Therefore there was sufficient evidence before the jury to sustain the verdict. (Comp. Laws of 1879, ch. 23, § 60; *Railroad Co. v. Rice*, 10 Kas. 426; *Railroad Co. v. Phillippi*, 20 id. 12; *Railroad Co. v. Wilson*, 28 id. 637.)

Counsel for the company assert that the killing of the cow was not caused by the omission to sound the whistle of the engine. In support of this, it is said that the plaintiff testified he heard the engine about half a mile away; that he could see the smoke at that distance, and therefore it is argued that he had ample notice of the train approaching the crossing. The evidence on the part of the plaintiff was to the effect that the train was about sixty or seventy rods from the crossing when he and his employé in charge of the drove of cattle—about forty in number—first saw it; that it was then running at the rate of fifteen miles an hour; that at the time, the drove were near to or upon the track; that the whistle was not sounded until the engine was close to the cattle; that a part of the cattle crossed the track, and the employé on horseback waved his hat from the track as a signal to the train to stop, and at the same time tried to keep the remainder of the drove, which had not crossed over, off the track. As soon as the parties in charge of the cattle saw the train coming, they did all they could do, according to their evidence, to save the cattle from being run over.

Although it is shown by the plaintiff's testimony that he heard the engine of a train puffing, more than half a mile from the crossing, and also saw the smoke of a train, he was not bound to conclude therefrom that the train would cross the highway, unless the whistle sounded three times, at least eighty rods from the crossing; but it is not conclusive from the evidence that the plaintiff thought the smoke he saw, and the puffing of the train he heard, was upon defendant's road

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which crossed the highway where the cow was killed. In answer to one question, he said that it "might have been on the Omaha extension of the Missouri Pacific." This road did not cross the highway, but the Santa Fé and the Central Branch of defendant's road did.

At the time of the killing of the cow the regular passenger train crossed the highway each day at about three o'clock P. M., and the next regular train passed at five P. M. It was usual for Stevens to drive his cattle from his pasture over the crossing to his barn to feed, soon after the three o'clock train passed. He was driving his cattle from his pasture at the usual time on the day that his cow was run over. The train that ran into the drove seems to have been an extra or an irregular one, and therefore Stevens could not have anticipated that the train he heard a half-mile distant would pass the crossing, unless the whistle was sounded eighty rods therefrom.

We perceive no error in permitting the witness Bardshar to testify that the train doing the injury was an extra or an irregular one. He had worked for Stevens for several months before the killing of the cow, and had lived all this time at his house, which was very near the track. He had crossed the track where the cow was killed, about twice a day from the first of July previous, and was able to tell the time the regular trains crossed the crossing; therefore he had sufficient knowledge of the running of the trains to testify.

The court directed the jury—

"That it was the duty of the plaintiff to keep a lookout for trains, and not to drive his cattle upon or across the track at a time of apparent danger; and it was the duty of the servants of the defendant to keep a lookout for obstructions at crossings, and if cattle were seen on the track in time to prevent injuring them, to exercise ordinary care in endeavoring to do so, but if the animal killed got upon the track so suddenly, and so near to the approaching train, as to make it impracticable to prevent the injury, then there could be no recovery for the loss of the animal, unless upon the ground of a failure to sound the whistle, causing the plaintiff and his servant to act differently in the management of his cattle from what he would have done if it had been sounded."

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With the direction given, there was no material error in refusing the instruction of the company as to the duty of the plaintiff taking proper precautions in crossing the track with his cattle.

The judgment of the district court will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. CHASTEEN HUGHES.

1. **BIGAMY—First Marriage—Allegation and Evidence.** In a prosecution for bigamy, it is not necessary to allege in the information or indictment the exact time and place of the first marriage. It is sufficient in that respect to allege and prove that the marriage relation existed between the accused and his first wife at the time of the second marriage.
2. **FORMER MARRIAGE; Competent Evidence.** In such a prosecution, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, are evidence tending to prove an actual marriage, upon which a jury may convict.
3. ——— **Inadmissible Evidence for Defendant.** The declarations of the defendant, made in his own favor, respecting the first marriage, which formed no part of any statement or conversation called out by the state, and which were no part of the *res gestæ*, are inadmissible for the defense.
4. ——— **Revision of Sentence.** The district court may, until the term ends, revise, correct or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation.

Appeal from Shawnee District Court.

PROSECUTION for bigamy. At the September Term, 1885, the defendant *Chasteen Hughes* was tried, found guilty, and sentenced to be confined in the penitentiary for one year. He appeals.

35	626
38	667
35	626
49	315
49	318
35	626
54	626
35	626
56	318
35	626
57	609
35	626
59	618
35	626
60	77
35	626
63	60
35	626
67	182
35	626
79	575

Jetmore & Son, for appellant.

S. B. Bradford, attorney general, and *Charles Curtis*, county attorney, for The State.

The opinion of the court was delivered by

JOHNSTON, J.: This is an appeal from a judgment of conviction rendered against the appellant for bigamy. It was alleged in the information that—

“Chasteen Hughes, at the county of Shawnee, in the state of Kansas aforesaid, and within the jurisdiction of this court, on the 21st day of March, 1885, did then and there unlawfully and feloniously marry one Loretta Cavender, and her, the said Loretta Cavender, then and there had for his wife, and the said Chasteen Hughes then and there being a married person, being then and there married to one Mary Hughes, she, the said Mary Hughes, being then and there alive, and the bond of matrimony between the said Chasteen Hughes and Mary Hughes then being still undissolved.”

It is insisted by the appellant that the information is defective in this, that it does not state the time and place of the

1. First marriage; allegation and evidence.

first marriage; and the refusal of the court to quash the information upon that ground, is the first objection which is made. The objection is not good. There is nothing in the statute nor in the nature of the offense requiring such particularity of averment. The offense, as defined by statute, consists in marrying a second time while the husband or wife of the defendant is still living. That the accused had a wife living at the time he contracted the second marriage, is an essential allegation which should be stated with precision. But information of the exact time and place of the first marriage is not always available to the prosecution, nor is it very important to the defense. It is enough to allege and show that the marriage relation had been entered into and existed between the accused and his first wife at the time of the second marriage. The information clearly charges that the defendant had a wife living at the time of the second marriage, and the first wife is identified

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and described by name, which is sufficient to apprise him of the particular offense against which he is required to defend. The substantial rights of the defendant upon the merits could not have been prejudiced by the absence of these averments, and the ruling of the court upon the motion cannot be held erroneous. (Crim. Code, § 110; *Hutchins v. State*, 28 Ind. 34; *State v. Bray*, 13 Ired. 289; *State v. Armington*, 25 Minn. 29.)

The principal question presented upon the appeal is the competency and sufficiency of the testimony offered to establish the alleged first marriage of the appellant. This question arises upon an objection to testimony offered by the state of the admissions and conduct of the defendant, with respect to the first marriage, and upon the charge of the court. The learned judge who tried the case refused to charge the jury that there must be proof of a formal celebration of the marriage ceremony, but gave the following instruction:

“The marriage between a man and a woman in this state is a civil contract to which the assent of the contracting parties is essential, and may be proven in this case like any other fact. The evidence of the admissions of the defendant that he and Mary Wheat intended to marry, the defendant’s admissions that he and Mary Wheat were married, and the evidence that the defendant and Mary Wheat cohabited together as husband and wife, and that he held her out to his neighbors and friends as his wife, and that there was a child born to them while cohabiting together, tend to prove the fact that the defendant and Mary Wheat were married, and were husband and wife.”

The doctrine of this instruction is denied by the appellant, and he contends that the admissions and evidence of cohabitation are inadmissible and insufficient to prove the first marriage until there is introduced some record evidence, or evidence by the officiator, or the testimony of an eye-witness, of the formal solemnization of the marriage; and to support his contention he cites *Commonwealth v. Littlejohn*, 15 Mass. 163; *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446; *People v. Lambert*, 5 Mich. 349; *State v. Armstrong*, 4 Minn. 335. The course of decision upon this question has

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not been uniform. In the states of New York, Massachusetts, Connecticut, and Minnesota, the rule contended for by the appellant has been held, but the weight of authority and the better reason support the proposition that the acts and declarations of the parties, coupled with cohabitation, are competent evidence to go to the jury in proof of marriage.

Mr. Greenleaf, in discussing the proof necessary to sustain the charge of bigamy, lays down the rule that the first marriage "may be shown by the evidence of persons present at the marriage, with proof of the official character of the celebrator; or, by documents legally admissible, such as a copy of the register, where registration is required by law, with the proof of the identity of the person; or, by the deliberate admission of the prisoner himself." (3 Greenl. Ev., § 204.)

In his work on Criminal Law, Mr. Wharton states that—

"When the *lex fori* recognizes, as is the case in all those jurisdictions in which the English common law continues in force, consensual marriages, the admissions of the parties may be received as tending to establish such marriages, whatever may be the weight to which they may be entitled, provided such admissions have not been extorted by force or fraud." (2 Wharton's Crim. Law, § 1700.)

As a general rule, the confession of a party voluntarily and deliberately made, is evidence of the highest nature against him. The objections urged against testimony of this character in a prosecution for bigamy, are that the confession may have been lightly made, or stated by parties living in a state of fornication for the purpose of avoiding public censure or public prosecution; but these are reasons which go to the credibility rather than to the competency of the testimony. The force and effect of the testimony are to be weighed and determined by the jury, and depend upon the manner and circumstances under which the confession was made. If it was carelessly stated, or the circumstances under which it was made indicated a purpose to conceal from the public illicit relations existing between the parties, the jury should not, upon such unsupported confession, convict the defendant; but

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where it is freely and solemnly made by parties cohabiting together, and frequently repeated to different persons, with no apparent motives to hide the real facts, it is clearly competent to go to the jury, whose province it is to determine its sufficiency. It is direct and positive proof of an actual marriage. Counsel for appellant conceded that a marriage might be proved by a witness present at the ceremony, and certainly a party to a marriage contract who has complete knowledge of the facts is as competent, and his testimony is of as high a nature, as that of a mere eye-witness, who may be mistaken as to the occurrence, the identity of the parties, or their capability to contract marriage. The confession in this case was that the appellant and Mary Wheat were married in Missouri. In that state it is not essential to the validity of a marriage that there should be any ceremony or formal solemnization of the contract. An agreement entered into in good faith between parties capable of contracting marriage, followed by cohabitation, is there held to be sufficient to constitute a valid marriage, and to subject them to legal penalties for a disregard of its obligations. (*Dyer v. Brannock*, 66 Mo. 391.)

By the terms of our statute, a marriage which is valid where it is contracted must be held valid in all courts and places in this state. (Comp. Laws of 1879, ch. 61, § 9.) If this marriage was then a mere consensual one, as it might have been, how can it be established? If the parties, by mutual consent, agreed to take each other as husband and wife, and thereafter cohabited as such, without any ceremony, religious or otherwise, how can the rule contended for by appellant be applied? In such a case there would be no record evidence, no officiator, and no eye-witness of the solemnization of the marriage. The best, and in fact about the only evidence, that can be offered to establish such a marriage, is the acts and declarations of the parties themselves. Some of the courts have gone to the extent of holding the bare confessions of the party to be competent and sufficient to establish marriage; but however that may be, the multiplied decisions are such that it may be regarded

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2. Former marriage; competent evidence.

as the settled doctrine of the American courts, that in prosecutions for bigamy, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, are evidence tending to prove actual marriage, upon which a jury may convict. (*State v. Hughes*, 2 Kas. L. J. 395; *Warner's Case*, 2 Va. Cas. 95; *Wolverton v. The State*, 16 Ohio 173; *Squire v. The State*, 46 Ind. 459; *Commonwealth v. Jackson*, 11 Bush, 679; *Cook v. The State*, 11 Ga. 53; *Langtry v. The State*, 30 Ala. 536; *State v. Hilton*, 3 Rich. 434; *Murtagh's Case*, 1 Ash. 272; *Forney v. Hallacher*, 8 Serg. & R. 159; *The State v. Britton*, 4 McCord, 256; *Williams v. The State*, 54 Ala. 131; *Halbrook v. The State*, 34 Ark. 511; *O'Neale v. Commonwealth*, 17 Gratt. 582; *The State v. Seals*, 16 Ind. 352; *Finney v. The State*, 3 Head, 544; *The State v. Libby*, 44 Me. 469; *Jackson v. The People*, 2 Scam. 231; *Commonwealth v. Henning*, 10 Phila. 209; *West v. The State*, 1 Wis. 209; *Miles v. United States*, 103 U. S. 304.)

About the sufficiency of the testimony to sustain the verdict when assailed in this court, there can be little doubt. The conduct of the defendant, as detailed in the evidence, is strongly corroborative of his repeated and deliberate declarations that he married Mary Wheat in August, 1883. It is in testimony that the defendant was a frequent visitor at the home of Mary Wheat during the summer of 1883, and that in August of that year he asked and obtained consent of Mary's father to marry her, and that on the 15th of August, 1883, the defendant and Mary started to Kansas City, Mo., with the avowed purpose of getting married. Both parties subsequently declared that they were there married, and they exhibited a marriage certificate which purported to be duly signed and witnessed, dated August 16, 1883, by which it appeared that they had been married by a Methodist minister of Kansas City, Missouri. They lived together as husband and wife in the cities of Leavenworth, Wyandotte, Kansas City, and Topeka, from August, 1883, until March, 1885. During this time they visited among and were visited by their

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relatives and acquaintances, when the defendant introduced, spoke of and in all respects treated Mary as his wife. On December 13, 1884, while they were living and cohabiting together, a child was born to them. During the same time the defendant applied to become a member of the "Ancient Order of Foresters," and in the blank application for insurance, the blank being filled out in writing by himself, he designated Mary Hughes as his wife. This application gives the name of the defendant, his age, occupation, and post-office address, and designates his wife as beneficiary, stating her name, age, and condition of health. It is true, there was contrary testimony offered on behalf of the defendant, but as the second marriage was conceded, a finding of guilty on the foregoing testimony will certainly not be disturbed.

It is next contended that the court erred in excluding testimony offered by the defendant. Mrs. Dora Wheat was asked to state "what was said to her by the defendant and her daughter while they were living together as to their relations with one another with reference to being married." The objection to this question was properly sustained.

3. Inadmissible
evidence for
defendant.

It did not appear that the testimony sought for was a part of any conversation called out by the prosecution, nor can it be regarded as a part of the *res gestæ*, but rather as a self-serving declaration of the defendant which was not admissible. The answer of the witness that Mary Wheat lived with the defendant in the relation of mistress instead of wife, was a mere conclusion of the witness, and was also rightly excluded from the jury.

The final complaint made in the case is, that the court erred in the sentence. When the defendant was first called for sentence, the court inadvertently adjudged him to confinement at hard labor in the penitentiary for a term of six months. This, of course, was erroneous, for no person can be sentenced to confinement at hard labor in the penitentiary for a term less than one year. (Comp. Laws of 1879, ch. 31, § 291.) Within an hour after sentence was pronounced, the attention of the court was called to the mistake, and the prisoner and his coun-

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sel being still in court, the case was again called, and the court proceeded to sentence the prisoner to imprisonment for a term of one year. It does not appear that a formal order was made setting aside the first sentence, but the court pronounced the second sentence upon the same verdict, stating in the record as a reason for its action, that the statute did not authorize the judgment first pronounced. This was, in effect, a setting aside of the first judgment; and the only formal judgment recorded in the case is the one under which the prisoner is in custody sentencing him to imprisonment for one year. The general rule is that the records of a court may be corrected or revised at any time during the term at which the judgment is rendered. The sentence first pronounced against the defendant was not executed or put into operation, and "so long as it remained unexecuted, it was, in contemplation of law, in the breast of the court, and subject to revision and alteration." (*Commonwealth v. Weymouth*, 2 Allen, 147.) We think it is

4. Sentence may
be revised.

clearly within the discretion and power of the court until the end of the term, to amend and revise or increase the sentence which had not gone into effect. (1 Bish. on Cr. Proc., § 1298, and cases cited.) As nothing had been done under the sentence first pronounced, and as the final sentence did not impose a penalty in excess of that provided by law, the rights of the defendant were not ipfringed upon, nor has he any ground for complaint.

Finding no error in the record, the judgment of the district court will be affirmed.

All the Justices concurring.

SIMEON BATES V. L. N. LYMAN.

1. **PETITION IN ERROR, Filed in Time for Review.** Where a petition in error is filed in the supreme court within one year after the making of an order overruling a motion for a new trial, the proceeding is in time for a review of all the rulings of the court made during the trial, and excepted to at the time, which are referred to in such motion.
2. ——— **Burden of Proof.** The burden of proof lies on the party who asserts the affirmative of the issue or question in dispute.
8. **PLEADING; Burden of Proof on Defendant.** In an action brought to recover damages for breach of a written contract to deliver good merchantable corn, the plaintiff alleged and proved, and the defendant admitted, the payment of the money under the contract, and the non-delivery of the corn; the answer stated a tender of the amount and quality of the corn contracted for, and the plaintiff's refusal to accept it; the reply denied that any corn of the quality contracted for was tendered, and further alleged that the corn tendered by the defendant was light and damaged. *Held*, That the burden was upon the defendant to prove that the corn tendered by him was good merchantable corn, as he asserted the affirmative in his answer, that a tender of such corn had been made.

Error from Neosho District Court.

ACTION brought by *Bates* against *Lyman*, to recover damages for the alleged breach of a certain written contract made between the parties, whereby the defendant agreed to sell and deliver to the plaintiff 500 bushels of good merchantable corn, at 40 cents per bushel, etc. Trial at the April Term, 1884. Upon the verdict and special findings returned by the jury, the court adjudged that the plaintiff recover of the defendant \$185, and that the defendant recover of the plaintiff the costs in the action, taxed at \$85. The plaintiff filed a motion in arrest of judgment and for a new trial, which motion the court overruled. *Bates* brings the case here. The opinion states the material facts.

T. J. Hudson, and *C. S. Reed*, for plaintiff in error.

Hutchings & Keplinger, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J. : A preliminary question is presented in the motion made to dismiss the petition in error, upon the ground that it is barred by the statute of limitations. (Laws of 1881, ch. 126, § 2.) The case was tried April 10, 1884, and judgment appears to have been entered upon the same day. A motion in arrest of judgment and for a new trial was filed April 12, 1884, heard April 16, 1884, and upon that day overruled. Among the grounds for a new trial it was alleged in the motion that there were errors of law occurring at the trial, which were excepted to by the plaintiff. Said § 2 provides :

“No proceeding for reversing, vacating or modifying judgments or final orders shall be commenced, unless within one year after the rendition of the judgment, or making of the final order complained of.”

The petition in error in this case was filed April 14, 1885, less than a year from the time of the overruling of the motion for a new trial. This court has the authority to reverse, vacate or modify an order that grants or refuses a new trial. (Code, § 542.) Upon the hearing of a motion for a new trial, all of the rulings of the court made during the trial and therein referred to and excepted to at the time they were made, should be again considered by the court. (*Backus v. Clark*, 1 Kas. 303; *DaLee v. Blackburn*, 11 id. 190; *City of Ottawa v. Washabaugh*, 11 id. 124.) As the order complained of is the overruling of the motion for a new trial, and as the petition in error has been filed within one year from the making of the order complained of, the motion to dismiss must be overruled. (28 Kas. 769; 29 id. 476, 481.)

The plaintiff, for his cause of action against the defendant, alleged in his petition that on September 1, 1881, he entered into a contract with the defendant whereby the latter agreed to furnish him five hundred bushels of good merchantable corn, at forty cents per bushel, to delivered at the Douglas farm, west of Thayer, or in the vicinity of Altoona, Kansas,

Bates v. Lyman.

at the option of the defendant; the corn to be measured at four thousand cubic inches to the bushel, and to be cribbed by December 1, 1881. The petition also alleged that the plaintiff paid the defendant two hundred dollars, as the purchase-price of the corn; that on April 10, 1882, he demanded of the defendant delivery of the corn contracted for; that the defendant refused to comply with his contract and failed to deliver any corn, and at the time of such refusal, good merchantable corn was worth at the place of delivery, eighty-five cents per bushel.

The defendant in his answer stated, among other things:

"That in pursuance of the written contract between himself and plaintiff, he purchased five hundred bushels of good merchantable corn, and caused the same to be cribbed at the place designated in the contract, during the month of November, 1882, and held the same until April 10, 1883; that plaintiff refused to receive the corn, and wholly failed to comply with the conditions of the contract."

To this answer the plaintiff filed a reply, denying generally the allegations contained in the answer, except those specifically admitted. He denied that any corn of the quality contracted for was delivered or tendered to him. He further alleged that the corn tendered or offered to him by the defendant, was light and damaged corn; that subsequently the defendant took the corn and appropriated it to his own use.

The important question upon the trial was, whether the corn tendered by the defendant was good merchantable corn. The plaintiff asked the court to instruct the jury that the burden was upon the defendant to prove that the corn tendered was good merchantable corn. The court refused this instruction, and charged the jury that "the burden of proof was upon the plaintiff to satisfy them by a preponderance of the evidence that the corn tendered was not good merchantable corn." It appears from the evidence that there was great conflict in the testimony, as to the quality of the corn cribbed and tendered, and this was the substantial issue in the case.

We think the trial court mistook the scope of the allega-

Opinion of the Court.

tions contained in the reply of the plaintiff. There is no admission therein that the defendant cribbed or tendered any corn of the quality described in the written contract. The reply stated that "the corn tendered or offered to plaintiff by the defendant was light and damaged." If the plaintiff had filed a reply containing a general denial only, we suppose it would be conceded that the burden of proving a tender of good merchantable corn would have rested upon the defendant, as he asserted affirmatively that a tender of such corn had been made by him. We do not think the allegations in the reply change this burden in any respect. The plaintiff alleged and proved, and the defendant admitted, the payment of the money under the contract, and the non-delivery of the corn. As a compliance with the contract, the defendant alleged a tender of the amount and quality of the corn, and the plaintiff's refusal to accept it. In order to establish a tender of the corn, it was necessary for the defendant to show that a tender of good merchantable corn was made. The rule is, that where a party pleads a tender or payment, the burden is upon him to prove it. (1 Best on Ev., §§ 268, 269, 270; *Burton v. Boyd*, 7 Kas. 32; *Lathrop v. Davenport*, 20 id. 285.) In this case, under the pleadings, the burden was upon the defendant to prove that he made a tender of good merchantable corn. There is no admission in the reply of the plaintiff of a tender of good merchantable corn, and the trial court committed material error in throwing upon the plaintiff the burden of proving that the corn tendered was not good and merchantable.

The judgment of the district court will be reversed, and the case remanded for a new trial.

All the Justices concurring.

Birdzell v. Birdzell.

C. J. BIRDZELL V. MARGARET BIRDZELL, *by John Tucker, her Guardian.*

Motion for Rehearing.

ACTION for divorce, brought by *Margaret Birdzell* against *Caleb J. Birdzell*. The material facts appear in 33 Kas. 433, *et seq.* The defendant in error filed a motion for a rehearing, which the court decided at its session in October, 1886.

E. Hill, and *Rossington, Johnston & Smith*, for plaintiff in error.

Campbell & Dyer, for defendant in error.

Per Curiam: This is an application for a rehearing, made by the defendant in error. We have carefully examined all the authorities presented, and are satisfied with the law as declared in this case in 33 Kas. 433. The application will therefore be denied.

Counsel for defendant in error allege that Birdzell has abandoned his wife without providing any support; that she is insane, and destitute; and that it is gross injustice that the husband should not be compelled to make some provision for her maintenance and comfort out of the money that came to him through his wife. Counsel also contend that independent of any statute, the district court, as a court of equity, should grant relief in the case. The petition filed in this case is in the form of an ordinary action for divorce and alimony under the provisions of the statute. (Civil Code, §§ 639-649.)

We have not decided, and have not intended to decide, that the unquestioned duty of the husband to support his wife may not be enforced by a court of equity upon proper proceedings commenced therefor. If the petition heretofore filed be amended so as to show that Birdzell has abandoned his wife and separated himself from her without providing any sufficient support, and other facts are set forth showing that the wife has no adequate or sufficient remedy under the statute,

The State v. Elrod.

then a case will be presented as to the jurisdiction of the district court, as a court of equity, to grant salutary relief independent of the statute relating to divorce and alimony. When such a case is before us, it will be time enough for us to decide whether there is any remedy for such wrongs by way of an allowance for suitable maintenance and support out of the estate of the husband.

JOHNSTON, J., not sitting.

THE STATE OF KANSAS v. T. H. ELROD.

ON July 29, 1885, before Thomas J. Noble, a justice of the peace of Ellsworth county, in a certain case of misdemeanor then tried before him, the jury found the defendant, *William Bohrer*, not guilty; thereupon the justice discharged the defendant, and rendered judgment for all the costs in the case, taxed at \$190.57, against *T. H. Elrod*, the prosecuting witness. Subsequently, the case was heard in the district court of said county, where it was adjudged that the judgment for costs against *Elrod* be reversed and held for naught. *The State* brings the case here.

L. H. Seaver, county attorney, and *Carter & Harrison*, for The State.

Garver & Bond, for defendant in error.

Per Curiam: T. H. Elrod, defendant in error, made complaint under oath before Thomas J. Noble, a justice of the peace of Ellsworth county, charging William Bohrer with the offense of unlawfully disturbing the members of a religious society while meeting together for the purpose of worship. The defendant was tried before the justice of the peace, and the case was subsequently heard in the district court. Judge

The State, *ex rel.*, v. Comm'rs of Hamilton Co.

ment was rendered in that court relieving the complainant from costs. To review and reverse that decision, a petition in error has been filed in this court. No appeal has ever been taken from the district court to the supreme court, and as the case is not a civil action, it is not rightfully brought to this court, and the petition in error must therefore be dismissed. (*Reisner v. The State*, 19 Kas. 479; *McGilvray v. The State*, 19 id. 481; *McLean v. The State*, 28 id. 372.)

35	640
36	170
36	186
39	77
39	81
39	578

35	640
60	75

THE STATE OF KANSAS, *ex rel.* S. B. Bradford, Attorney General, v. THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY, *et al.*

1. COUNTY-SEAT ELECTION; *Mandamus*; *Jurisdiction of Supreme Court.* In an action of mandamus, brought in the supreme court in the name of the state of Kansas, by the attorney general, to compel the county officers of a certain county to hold their offices at the town of K., which is alleged to be the county seat of the county, *held*, that the supreme court has jurisdiction to hear and determine the case, although in the determination thereof it may be necessary to determine the result of an election held in the county to permanently locate the county seat of such county, and for frauds perpetrated in one of the townships of such county, to wholly ignore the returns from such township and the canvass thereof, and the declaration made by the board of canvassers that a place other than K. had become by such election the permanent county seat of the county.
2. ——— *No Registration of Voters, When.* Chapter 89 of the Laws of 1881, which provides generally for the registration of voters at county-seat elections, has no application to the first election held in a newly-organized county.
3. RETURNS, ETC., *Wholly Ignored for Fraud.* Where an election has been held in a county for the permanent location of the county seat, and it appears from the evidence that more than two-thirds of the votes cast in one township, as shown by the returns from that township, were illegal and fraudulent, and it cannot be accurately ascertained how many legal votes were polled in such township; and other frauds were committed, and these frauds were participated in by the

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judges and the clerks of the election, and others, *held*, in an action of mandamus, such as is mentioned in the first number of this syllabus, that the returns from the aforesaid township and the canvass thereof, and the declaration of the canvassing board, will be wholly ignored by the court, and not considered as any evidence in determining the result of the election.

Original Proceedings in Mandamus.

ACTION brought in this court, April 21, 1886, by *The State* against *The Board of Commissioners of Hamilton County*, and the county clerk thereof, to compel the defendants to hold their offices at the town of Kendall, which is alleged to be the county seat of that county. The material facts are stated in the opinion, filed at the October, 1886, session of the court.

B. F. Simpson, and *John M. Johnson*, for plaintiff.

Wm. O. McKinlay, county attorney, and *Webb & Spencer*, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This is an action in the nature of mandamus, brought originally in the supreme court in the name of the state of Kansas on the relation of S. B. Bradford, attorney general, against the board of county commissioners, and Thomas H. Ford, county clerk, of Hamilton county, to compel the defendants to hold their offices at the town of Kendall, which is alleged to be the county seat of said county. An alternative writ of mandamus was allowed and issued, which alleges, among other things, that the county of Hamilton was organized on January 29, 1886; that the town of Kendall was designated by the governor as the temporary county seat; that the first election for county and township officers and for the permanent location of the county seat was held on April 1, 1886; that returns were made of such election; that such returns were canvassed by the board of county commissioners on April 16, 1886; and that such returns and the canvass thereof show that votes were polled in the following town-

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ships for the following towns as a permanent county seat, to wit:

TOWNSHIPS VOTING.	TOWNS VOTED FOR.				Total.
	Coolidge.	Hartland.	Kendall.	Syracuse.	
Coolidge.....	452		1	10	463
Grant.....	29	83	37	34	183
Hartland.....	1	97	5	1	104
Kendall.....			251	1	252
Stanton.....	4		54	37	95
Syracuse.....			2	1,176	1,178
Totals.....	486	180	350	1,259	2,275

It is claimed, however, on the part of the plaintiff, that for reasons which will hereafter be stated, this election was illegal, fraudulent and void, and that the county seat of Hamilton county still remains temporarily located at Kendall, where it was temporarily located by the governor. The alleged fraud is confined exclusively to Syracuse township. It is alleged that in that township not more than 350 legal votes could have been polled, from the fact that not more than 350 legal voters resided there at that time, and that all the other votes apparently polled in that township, as shown by the aforesaid returns and the canvass, are illegal and fraudulent. The defendants have made a return to the alternative writ, and in such return have substantially admitted all the allegations contained in the writ, except that there was fraud, illegality or irregularity in the conduct of the election in Syracuse township, and they allege that in that township the election was regular and legal and valid, and that the number of votes which the returns and the canvass show were polled, were in fact polled, and that by such election and canvass the town of Syracuse became the permanent county seat of Hamilton county, and that the defendants are now holding their offices there rightfully, legally and properly. A trial was had before the court, and upon the facts admitted, the evidence introduced, and the law of the case, we shall now proceed to decide the case and the questions involved therein.

I. It is claimed by the defendants that the supreme court

has no jurisdiction to hear and determine this case; and this claim is made upon the following grounds: First, the plaintiff has another plain and adequate remedy; second, this court cannot go behind the election returns and the canvass thereof and declare them incorrect or invalid; third, the county seat having been declared to be permanently located at Syracuse, it is the duty of the defendants, in obedience to that declaration and without questioning its force or authority, to hold their offices there until it has been settled by some proper judicial proceeding that the county seat is not located at that place; and possibly, also, fourth, the supreme court "cannot control judicial discretion" by a writ of mandamus, and to require that the defendants in this case shall remove their offices from Syracuse to Kendall, would be to control judicial discretion. We think the claim that the supreme court has no jurisdiction to hear and determine this case is untenable. This action is prosecuted in the name of the state of Kansas, by the attorney general, who has the right to prosecute and defend in the name of the state and for the state, and the state unquestionably has the right to require that all county officers shall hold their offices at the county seat; and we know of no other plain and adequate remedy which the state may resort to for this purpose. The fact that the statute (sec. 5 of the act relating to the organization of new counties) provides that, after the canvass of the election returns has been had, and a particular place declared by the canvassing board to be the county seat, "That any person or persons interested, and claiming that the place so declared the county seat was not made such by a majority of the legal votes cast at such election, may, upon giving full security for all the costs of the contest in case of their failure therein, contest such election before the district court of the county or of that county to which the same may be annexed for judicial purposes," does not give to the state of Kansas any other plain or adequate remedy, or indeed any remedy, to compel the county officers to hold their offices at the place where the county seat is in fact located. Nor are the election returns or the canvass

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thereof ever considered conclusive, but only *prima facie* evidence of what they purport to show. The board of county commissioners, acting as a board of canvassers in canvassing election returns, do not act as a judicial tribunal, but only act as ministerial officers. This is so held by all the courts. (*The State v. Marston*, 6 Kas. 534; *Patton v. Coates*, 41 Ark. 111.) And where an election is so irregular or fraudulent as to be absolutely void, as is claimed in this case, and a question which we shall hereafter consider, it may of course be treated as void in any judicial proceeding or elsewhere; and such treatment will not be a control of judicial discretion in any sense. We think the supreme court has the power in this action to require that the county officers shall hold their offices at the place where the county seat may in fact and in law be found to be located. The action of mandamus in this state includes both the old common-law proceeding of mandamus, and the action on the case for a false return. (*The State v. Comm'rs of Jefferson Co.*, 11 Kas. 68.)

II. The plaintiff in this action claims that the election is void for the reason that no registration of the electors of the different voting precincts was had, as required by chapter 89 of the Laws of 1881. This chapter we think has no application to this case. This chapter provides generally for the registration of voters at county-seat elections; but this chapter has no reference, unless by implication, to county-seat elections in the organization of new counties. This claim of the plaintiff we think is untenable. Under § 1 of this chapter, the persons authorized by law to act as judges of election for any precinct are required to meet on Tuesday three weeks before the election, to act as a board of registration, and to make the registry lists. Now when new counties are organized, there are no persons authorized by law to act as judges of election prior to 9 o'clock of the morning of the first election, and therefore there are no persons authorized to make registration lists. Section 4 of the act relating to the organization of new counties and to the first elections therein, (Comp. Laws of 1879,

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¶ 1362,) is the only act that provides how the election boards at such elections shall be selected, and it provides that—

“The voters at such election may assemble at 9 o'clock A. M. in each election precinct; shall select from among themselves three judges and two clerks for the election, who, before they enter upon the discharge of their duties, shall take the oath required by law of judges or inspectors and clerks of election, any one of whom may administer such oath to the others,” etc.

It will be seen from a reading of this last-mentioned section, that judges and clerks of election are expressly provided for by such section, and therefore that there is no room for any other law to apply by implication. Section 2 of the aforesaid registration act also provides that the registration board of each precinct shall in making the registration list use “the poll-book kept in said precinct at the last preceding election,” when in fact there is no such poll-book in new counties, and could not be prior to the first election. Said § 2 also provides that the original registry list shall be filed in the office of the township clerk of the township, when in fact there is no such officer at such a time, and could not be under the statutes. Section 3 of the act provides that in certain cases the township trustee may appoint judges of election to make the registration, but prior to the first election in the organization of new counties there can be no township trustee. Section 4 provides that the registration board shall meet on Tuesday of the week preceding the election and correct and revise the registration lists; and section 11 provides that these lists shall at all times be open to public inspection at the office of the authorities in which they shall be deposited, when in fact prior to the first election in new counties there can be no authorities with which the lists might be deposited. There are several other provisions in the act relating to the registration of electors for the permanent location or relocation of county seats which are inconsistent with the provisions of the act relating to the organization of new counties; and if such registration act should be made to apply to elections held under the act relating to the organization of new counties, it would

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be necessary to ignore and even to violate some of the provisions of either one or the other of such acts. We do not think that the registration act can apply to the first election held in a newly-organized county. Where a statute relating to registration, or indeed to anything else, cannot in the nature of things be made to apply, it must be held that it does not apply, and that the legislature did not intend that it should apply. (*Campbell v. Braden*, 31 Kas. 754.)

III. The plaintiff claims that the election in Syracuse township was so fraudulent that the returns from that township are not entitled to any consideration. It appears from the evidence that there could not have been more than 350 legal voters residing in that township at the time of the election, and in all probability there were not that many; while the returns from Syracuse township and the canvass of such returns show that there were 1,178 votes polled in that township. Therefore at least 828 of the votes shown to have been polled by such returns and canvass must have been illegal and fraudulent. It appears from the election returns from the various precincts of Hamilton county, that at that election the town of Coolidge received 486 votes for county seat, the town of Hartland received 180 votes for county seat, the town of Kendall received 350 votes for county seat, and the town of Syracuse received 1,259 votes for county seat; and the town of Syracuse received all the votes polled in Syracuse township except two, hence estimating that there were 828 illegal votes polled in Syracuse township, and that the town of Syracuse received 826 of such votes, the town of Syracuse could not have received more than 431 legal votes for the county seat, a less number than the town of Coolidge received, and a much less number than a majority of all the votes cast at that election, and such a majority is required by the statute to permanently locate the county seat of any county. (Act relating to the organization of new counties, § 5.) The names fraudulently appearing upon the election returns of Syracuse township as the names of legal voters of such township, and canvassed as such, were made up by placing on the poll-books

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of such township fictitious names, the names of the same persons two or three times, the names of dead persons, and the names of persons residing elsewhere. For illustration, the names of 133 voters of Silver Lake township, Shawnee county, were placed upon the poll-books, and also the names of several residents of the city of Topeka, among whom were two well-known Topeka lawyers; and also the names of 43 voters of Malvern township, Mills county, Iowa; and also the names of several persons two or three times; and even William Penn was made to vote at that election. Nobody knew of any such person as William Penn residing in that county. Besides, it was actually shown that at least five persons in Syracuse township voted for the town of Kendall, while the poll-books and canvass show that only two so voted. The fraudulent names were interspersed among the names of genuine and legal voters, or rather, *vice versa*, as the fraudulent names vastly outnumbered the names of the genuine legal voters. We are inclined to adopt the views of the plaintiff, and hold that the election in Syracuse township was so fraudulent that the returns therefrom and the canvass thereof must be wholly ignored. This is entirely consistent with the views heretofore expressed by this court in the following cases: *The State v. Marston*, 6 Kas. 524, 538; *Russell v. The State*, 11 id. 308, 322; *The State v. Stevens*, 23 id. 456. And these views seem to be sustained by the decisions of courts elsewhere: *Patton v. Coates*, 41 Ark. 111; *Thompson v. Ewing*, 1 Brewst. 67, *et seq.*; *Wallace v. Simpson*, 4 id. 454; *In re Duffy*, 4 id. 531, *et seq.*; *People v. Thacher*, 55 N. Y. 525; *McCrary on Elections*, § 436, *et seq.*, and cases there cited; *Howard v. Cooper*, Contested Elections in Congress, 1834 to 1865, p. 275; *Blair v. Barrett*, id. 308; *Knox v. Blair*, id. 521; *Washburn v. Voorhees*, House Miscellaneous Contested Elections, 1865 to 1871, p. 54; *Reid v. Julian*, id. 821. Judge McCrary, in his work on Elections, uses the following language:

“SEC. 436. Although the return of the vote of a given precinct, made in due form, and signed by the proper officers, is the best evidence as to the state of the vote, yet it may be im-

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peached, on the ground of fraud or misconduct on the part of the officers of the election themselves, or on the part of others. In election cases, however, before a return can be set aside, there must be proof that the proceedings in the conduct of the election, or in the return of the vote, were so tainted with fraud that the truth cannot be deduced from the returns. The rule is thus stated in *Howard v. Cooper*, (1 Bartlett, p. 275 :) 'When the result in any precinct has been shown to be so tainted with fraud that the truth cannot be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for, the rejection of the entire poll, when stamped with the characteristics here shown.'

"SEC. 437. The rule just stated needs the following explanation, in order that it may be correctly understood. The committee no doubt meant to say that if the result, *as shown by the returns*, is tainted with fraud, the returns are to be rejected as false and worthless. But as we have elsewhere seen, the question whether the entire vote of the precinct shall be rejected for fraud, depends upon another question, viz.: Whether from any evidence it is possible to ascertain the true result. The returns may be rejected as fraudulent, and yet the true vote may, in some cases, be ascertained, and where it can be ascertained, independently of the rejected returns, the law requires that it be respected and enforced. Where the true vote cannot be ascertained either from the returns or from evidence *aliunde*, the vote of the precinct is to be rejected.

"SEC. 438. The return must stand until such facts are proven as to clearly show that it is not true. When shown to be fraudulent or false, it must fall to the ground. This ruling is well settled by numerous authorities, including the following: *Blair v. Barrett*, 1 Bartlett, 308; *Knox v. Blair*, 1 Bartlett, 520; *Howard v. Cooper*, *supra*; *Washburn v. Voorhees*, 2 Bartlett, 54."

It will make no difference, so far as this case is concerned, whether the vote of Syracuse township be wholly ignored, or only so much of it as is unquestionably fraudulent. In either case, the result reached must be precisely the same. In either case, no place can be considered as having received a majority of all the legal votes, and therefore no place can be considered as having become the permanent county seat of the county. We think, however, that the election in Syracuse township

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and the returns thereof are of such a fraudulent character that the entire vote of that township must be wholly ignored. There were not merely a few scattering illegal votes cast in that township, but a great fraud was committed therein; participated in by the judges and the clerks of the election, and by a large proportion of the inhabitants of the township. It is certain that more than two-thirds of all the votes claimed to have been polled in that township are illegal and fraudulent; and how many of the others are illegal and fraudulent cannot be ascertained with any degree of accuracy. Possibly a large number of them are. It is also certain that more votes were polled in Syracuse township for the town of Kendall than the poll-books show; and whether there were not many other frauds committed of a similar character is left in doubt and uncertainty. The poll-books, the returns, and the canvass thereof, being so thoroughly impeached as they have been, cannot be considered as furnishing any evidence upon these questions. They cannot be considered as any evidence of the number of legal votes polled, nor of the place for which they were polled. And there is really no competent evidence upon this subject. Everything tending to show what the honest vote in Syracuse township was, is left in uncertainty and doubt. Hence, considering the fraud perpetrated there, that vote must not and indeed cannot be counted.

A peremptory writ of mandamus will be awarded, commanding the defendants to hold their offices at Kendall, the temporary county seat of Hamilton county.

All the Justices concurring.

THE STATE OF KANSAS v. W. H. McLAUGHLIN.

CRIMINAL COMPLAINT—*Public Offense, Charged.* A criminal complaint filed in a justice's court, charging among other things that the defendant, certain articles "of the goods and chattels of one M. [who is not the defendant], then lately before feloniously stolen, taken and carried away, *unlawfully* and feloniously did buy and receive," "*contrary to the statute* in such case made and provided," charges a public offense, although it may not in express terms, but only impliedly, charge that the property was "stolen from another" than the defendant.

Appeal from Franklin District Court.

PROSECUTION for unlawfully buying and receiving stolen property. At the January Term, 1886, the defendant *McLaughlin* was tried, found guilty, and sentenced to pay a fine of \$25 and the costs of the prosecution, and to be committed to the county jail until the fine and costs were paid. He appeals.

Jno. W. Deford, for appellant.

C. B. Mason, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: The defendant in this action was prosecuted before a justice of the peace, and afterward on appeal in the district court, on a criminal complaint charging him with unlawfully buying and receiving stolen property. The only question presented to the supreme court is, whether the complaint upon which he was prosecuted in the courts below is sufficient or not. The complaint reads as follows:

"STATE OF KANSAS, FRANKLIN COUNTY, ss.: Edward Heckler, being duly sworn, on oath says, that on the — day of October, 1885, in the county of Franklin and state of Kansas, William H. McLaughlin, then and there—one hand-saw, of the value of one dollar and fifty cents; one monkey wrench, of the value of fifty cents, of the goods and chattels of one David Miller, then lately before feloniously stolen, taken and carried away, unlawfully and feloniously did buy

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and receive, he, the said William H. McLaughlin, then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away as aforesaid, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Kansas."

This complaint was attacked in the court below by a motion to quash, by a motion for a new trial, and by a motion in arrest of judgment—all of which motions were overruled by the court below. The particular ground upon which it is claimed that the complaint is not sufficient is, that it does not state that the property alleged to have been stolen was "stolen from another," within the meaning of § 92 of the crimes act, but states the supposed offense in such an equivocal or ambiguous manner as to leave it open to be inferred that the property might have been stolen from the defendant himself. Now while the complaint is not as explicit as it might be, yet when fairly construed we think it is not open to the construction placed upon it by counsel for the defendant. The complaint states that the stolen property was "the goods and chattels of one David Miller, then lately before feloniously stolen, taken and carried away," and also states that the defendant "*unlawfully* and feloniously did buy and receive" the same, "*contrary to the statute* in such case made and provided." Under such a complaint it must be considered that the property was stolen from David Miller, and not from the defendant himself, and that the defendant "*unlawfully*" and "*contrary to the statute*" bought and received the property so stolen, and did not *innocently* "buy and receive" his own property, which had previously been stolen from himself.

The judgment of the court below will be affirmed.

All the Justices concurring.

35 652
39 730J. J. HOFFMAN, *et al.*, v. S. J. GROLL.

1. **TAX SALE; Defective Notice; Voidable Deed.** A tax-sale certificate and tax deed assigned and issued under the provisions of chapter 43, Laws of 1879, depend for their validity upon the regularity of the anterior tax proceedings, and upon the sale which was made when the land was bid in by the county; and the omission to state in the notice of such sale that the land would be sold at public auction, is a defect which renders the tax deed voidable.
2. **MORTGAGE; Foreclosure; Testing Tax Deed.** When a tax deed is set up in an action to foreclose a mortgage with a view of extinguishing the mortgage lien, the mortgagee has a right to question and have settled the validity of the tax deed, and in such a case no tender of the taxes paid was necessary.
3. **INVALID TAX DEED; Amount of Recovery by Holder.** Where such a tax deed is held to be invalid, the holder can only recover the reduced amount actually paid by him under the order of the county commissioners upon the tax-sale certificate, together with the interest thereon, instead of the full amount of taxes, interest and penalties, which were legally charged against the land.
4. **INTEREST — Amount of Recovery.** When a tax deed has been adjudged invalid, the holder can only recover interest on the amount found due for taxes at the rate of seven per cent. per annum from the date of the judgment. (*Corbin v. Young*, 24 Kas. 198.)

Error from Anderson District Court.

ACTION begun by *S. J. Groll*, to recover upon a promissory note and to foreclose a mortgage given upon a tract of land in Anderson county to secure the payment of the note. *J. J. Hoffman*, one of the defendants, claimed to have acquired title to the land by tax proceedings, and that the mortgage lien had been extinguished by virtue of a tax deed executed by the county clerk of Anderson county, on the 4th day of November, 1884. Belinda A. Foster, another of the defendants, claimed an interest in the same land through a mortgage executed on the 15th day of April, 1884, by J. J. Hoffman, to secure the payment of his promissory note for \$326.50. A trial was had at the March Term, 1885, without a jury, and the following

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special findings of fact and conclusions of law were made by the court:

"1. On and prior to September 15, 1870, one E. S. Nicolls was the owner in fee of the land in question, to wit: The S. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ S. 29, T. 20, R. 20, in this county. On that day he mortgaged said lands (his wife joining him) to the plaintiff to secure the payment of his note of the same date for \$1,000, due in two years, with interest at twelve per cent. per annum. There is now due to the plaintiff on this note and mortgage the sum of \$2,480, and the plaintiff's mortgage is a lien on said land for the payment thereof, unless divested by the tax sale and deed thereon, hereinafter referred to.

"2. This land was subject to taxation for the year 1873, and such taxes being delinquent, on the 8th day of May, 1874, it was offered for sale at the tax sale for that year, and could not be sold for the taxes and charges thereon, and was therefore bid off by the county treasurer for the county of Anderson. The subsequent taxes of 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, and 1882, were not paid, but charged up against said land, and the certificate remained unassigned, no person having offered to purchase the same for the taxes, penalties and costs due thereon; and the county treasurer did, on the first day of May, 1884, in pursuance to an order of the board of county commissioners, execute, and the county clerk did assign, the tax-sale certificate for said property to the defendant, J. J. Hoffman, for the sum of \$265.50, for the taxes of the years from 1873 to 1882, inclusive. A copy of this assignment is attached to the answer of defendant Hoffman, filed herein, August 2, 1884. J. J. Hoffman thereupon took actual possession of the land under this certificate on May 1, 1884, and has ever since remained in the actual possession of the same, and has made lasting and valuable improvements thereon, of the value of ninety dollars.

"3. On the 4th day of November, 1884, pending this suit, the county clerk made and delivered to said J. J. Hoffman a tax-title deed upon the sale and certificate above referred to, which deed is attached to and made a part of the supplemental answer of the defendant Hoffman, filed herein, January 14th, 1885, and is made a part of this finding.

"4. On the 2d day of September, 1884, at the tax sale in said county for that year, the said land was again sold to said J. J. Hoffman, for the delinquent taxes of 1883, amounting,

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with costs and penalties, to \$6.34, and a certificate issued accordingly; a copy whereof is also attached to said supplemental answer.

"5. On the tax-roll of 1873, in this county, the land in question is thus described and assessed: '30 A, S. $\frac{1}{2}$ and S. $\frac{1}{2}$ of N. $\frac{1}{2}$ N.E. of N.W. $\frac{1}{4}$ 29, 20, 20, Co. tax \$1.80, Tp. 22 cts., Sch. Dist. tax \$3.15, Sch. bond tax \$3.15, Del. Rd. tax 80 cts., R. R. tax \$3.38; total tax \$15.20, penalty \$1.01.'

"6. The tax-sale record of 1874 (taxes of 1873) shows with reference to this land as follows: 'No. of cert. 580, May 11; S. $\frac{1}{2}$ of N.E. of N.W. $\frac{1}{4}$ 29, 20, 20; name of purchaser, Anderson county; amt. for which sold, \$11.50; tax '74, \$12.42; '75, \$13.79; '76, \$19.42; '77, \$13.59; '78, \$13.55; '79, \$12.31; '80, \$8.78; '81, \$8.13; '82, \$7.85. To whom assigned, J. J. Hoffman, May 1, 1884. Amt. \$265.' The amounts named opposite each year above are the delinquent taxes for the said years respectively charged up against said land. At the date of the assignment to J. J. Hoffman there were due taxes, penalties, costs and charges on this land, computing interest and charges as allowed by law, \$455.29, not including taxes of 1883.

"7. The delinquent tax notice for the taxes of 1873, published in 1874, was in the following form:

"COUNTY TREASURER'S OFFICE,
"GARNETT, ANDERSON COUNTY, KAS., March 10, 1874. }

"All persons interested are hereby notified that so much of each tract of land and town lot as may be necessary for that purpose, will be sold by me at my office on the first Tuesday of May, 1874, and the days next succeeding, for the taxes of 1873, and charges thereon.

E. S. HUNT, *County Treasurer.*'

[Here follow numerous descriptions of land, among them this: S. $\frac{1}{2}$ of N.E. qr. of N.W. qr. S. 29, T. 20, R. 20.] The above notice was published as required by law.

"8. The final (or redemption) tax notice for the taxes of 1873, published in December, 1876, was as follows:

"FINAL TAX NOTICE.—Whereas, the following lands and town lots have been sold for taxes, to wit: On the 6th day of May, 1874, and the following days, to include the 12th day of May, 1874; and whereas, said lands and town lots have not been redeemed from said sale, as required by law, now, therefore, notice is hereby given that unless the said lands and town lots are redeemed on or before the 6th day of May, 1877, the same will be conveyed by tax deed to the purchaser: S. h. N.E. q. of N.W. q., S. 29, T. 20, R. 20, A. \$26.79. The amount set opposite each sale does not include the subsequent taxes.

"Given under my hand, at Garnett, Kansas, December 19, 1876.

E. PAIN, *Treasurer.*'

"The above notice was published in a weekly newspaper of

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the county for four consecutive weeks from and after December 23, 1876.

"9. On January 29, 1872, E. S. Niccolls and wife conveyed to D. Markel the S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ S. 29, T. 20, R. 20, 10 A., which was recorded March 24, 1872; and before May 11, 1874, Markel paid taxes for 1873, on this ten acres, \$5.

"10. For certain county printing, including the delinquent list and notice set out in the 7th finding, the county had a contract with the printer, whereby it paid only two cents for each description of land in said notice for each insertion. And for the final redemption notice set out in the 8th finding, the county by its contract with the printer paid 35 per cent. less than legal rates. The full legal rates allowed for printing were charged up against this land for publishing said delinquent list, viz., twenty-five cents, instead of the lesser sums actually paid, and formed a part of the charges for which the sale was made.

"11. On the 15th day of April, 1884, the said J. J. Hoffman executed and delivered a mortgage on said land to secure the payment of his promissory note of the same date, to the defendant, Belinda A. Foster, for \$326.50, upon which there is now due the sum of \$359.15."

CONCLUSIONS OF LAW.

"1. The delinquent tax notice was insufficient to uphold the sale made on the 8th day of May, 1874. The statute is mandatory, requiring that the notice shall state that the sale will be 'at public auction.' The notice in this case was fatally defective in this respect.

"2. The sale is invalid because a larger sum was charged against the land for printing the delinquent notice than was actually paid therefor under contract with the printer, and because a part only of a tract of thirty acres assessed in bulk was sold for a portion of the entire tax.

"3. The final or redemption notice was insufficient to uphold the deed based upon it, in two particulars: first, the time stated for making tax deeds is indefinite and uncertain, and provided for a deed before the expiration of the three years; second, it omits what the statute plainly requires, namely, a statement of the amount of taxes and interest calculated to the last day of redemption.

"4. The tax deed must be set aside, and an account taken of the taxes, interest and charges paid by the defendant Hoffman, and the interest due him thereon, which is the first lien

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upon said lands, and out of said sum the defendant Belinda A. Foster must be paid the amount due her under the 11th finding of fact.

"5. A judgment of foreclosure and sale may be entered, and out of the proceeds arising therefrom the liens above declared are to be satisfied in the order of their priority, together with costs."

A decree was entered which directed that the proceeds of the foreclosure sale should be applied, first, to pay Hoffman the amount of taxes, interest and charges paid by him, together with the agreed value of the improvements upon the land, amounting in all to \$426.95; and the decree directed further, that the defendant Foster should, out of that amount, be paid what was necessary to satisfy her mortgage; second, to the costs of the case; third, to the satisfaction of the judgment for \$2,480, rendered in favor of the plaintiff Groll. *Hoffman* excepted to the conclusions of law and to the decree entered, and comes here seeking a reversal.

J. W. Deford, for plaintiffs in error.

Johnson, Poplin & Johnson, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: The makers of the note and mortgage upon which this action was brought, have made no defense. J. J. Hoffman, who was made a defendant in the action, claimed under a tax deed, which, if valid, would extinguish the mortgage lien, and vest the absolute title to the land in himself. The mortgaged land was subject to taxation in 1873, and the taxes not being paid, it was offered for sale in 1874, and there being no bidders, it was struck off to the county. The subsequent taxes, for the years 1882 to 1884 inclusive, were not paid, but were charged up against the land. On May 1, 1884, the county clerk, by order of the board of county commissioners, and in accordance with the provisions of chapter 43 of the Laws of 1879, assigned the tax-sale certificate to Hoffman. The tax deed in question was based on that assignment, and was issued on the 4th of November following, and its validity

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was the principal question before the court. It was held by the district court to be invalid for several reasons; the first of which is that the county treasurer in his notice of the tax sale omitted to state that the land would be offered for sale at public auction. The statute, in terms, requires that the land shall be sold at public auction, and also that the notice shall contain the statement that the sale will be so made. It has been held that the omission of this statement in the notice, if taken advantage of before the statute of limitation runs, will defeat the deed. (*Hafey v. Bronson*, 33 Kas. 598; *Belz v. Bird*, 31 id. 139; *Corbin v. Young*, 24 id. 198.) Counsel for Hoffman contends that the tax deed is not based on a sale made pursuant to the defective notice, but is based wholly on the authority of chapter 43, Laws of 1879. The first section of that act reads as follows:

“Whenever any lands or town lots that may have been or shall hereafter be sold for any taxes due thereon, that may have been or shall hereafter be bought in by any county for such taxes, are or hereafter shall be unredeemed for three years from date of such sale, and no person shall offer to purchase the same for the taxes, penalties and costs due thereon, the county commissioners of the county where such lands or town lots are located, may permit the owner, his agent or attorney, to redeem the same, or may authorize the county treasurer to execute, and the county clerk to assign, tax-sale certificates for such lands or town lots, for any sum less than the legal tax and interest thereon, as shall be in their judgment for the best interest of the county; which assignment shall have the same force and effect as if the full amount of all taxes, interest and penalties had been paid therefor: *Provided, however*, That no deed shall be issued upon any certificate so assigned until six months after such assignment has been made.”

There is no authority given to the county commissioners in this section to make a sale of the lands which have been struck off to the county. They are only authorized to order the execution and assignment of tax-sale certificates for lands that have been previously sold for taxes. The assignment in such a case differs from an assignment of lands held by the county in other cases, only in this, that instead of the purchaser being

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required to pay the full amount charged against the land, he may be allowed by the commissioners to purchase the interest of the county in the land for a reduced amount. The tax-sale certificate executed by the county treasurer and assigned by the county clerk under this statute, is based upon the anterior tax proceedings, and upon the sale which was made when the land was bid in by the county; and therefore a legal notice of the sale is a prerequisite to the validity of the tax deed issued under the statute, and the omission to state in the notice that the land would be sold at public auction must be held to be a fatal defect in the deed in question.

The mortgagee was at liberty to question the validity of Hoffman's tax title, as he held under the original owner, and may protect the interest conveyed by the mortgage to the same extent as the original owner might do. It being an action to foreclose the mortgage, Hoffman, who claimed an interest in the land, was properly made a defendant. He set up his tax title, which, if upheld, divested the mortgage lien, and it was the duty of the court to determine the existence and priority of the liens claimed by the respective parties, and in such a case no tender of the taxes was necessary. The whole matter was before the court for equitable adjustment, and as the foreclosure has been decreed, the proceeds of the sale will be brought into court for distribution, and the interest of the holder of the invalid tax deed is fully protected.

The only other question which we need to notice is as to the amount allowed by the court to Hoffman. He was allowed \$265.50, which was the amount actually paid to the county on the tax-sale certificate, together with interest thereon, and the value of the improvements, but he claims that he was entitled to receive \$455.99—the full amount of taxes, interest and penalties legally charged against the land. Section 142 of the act relating to taxation provides that the successful claimant in an action where the tax deed is found to be invalid, shall be adjudged to pay the holder of the tax deed, or the party holding under him, the full amount of all taxes paid on such land. By § 2 of the chapter under which the cer-

tificate was assigned and the deed issued, it is provided that the party desiring to redeem as therein prescribed —

“Shall pay to the purchaser or holder of the tax certificate, his heirs or assigns, in money, the amount paid for the property, and all subsequent taxes paid thereon, with interest from the date of each payment, at the rate of twenty-four per cent. per annum.”

The court allowed the full amount to which he would have been entitled if the land had been redeemed, and he is entitled to no greater sum where the deed is held to be invalid.

The further claim of Hoffman for a greater rate of interest than was awarded by the court, has been determined against him. By the terms of the decree he was to receive interest at seven per cent. per annum on the amount of recovery from that date, the same as an ordinary judgment draws; and it has been decided that the amount due for taxes in any action in which the tax deed is set aside, draws interest thereafter at the rate of seven per cent. (*Corbin v. Young*, 24 Kas. 198.)

The judgment of the district court will be affirmed.

All the Justices concurring.

THE BAKER MANUFACTURING COMPANY v. J. W.
FISHER, *et al.*

ORDER OF ARREST; Bail, When Exonerated. The bail in an undertaking for a defendant arrested in a civil action, executed under § 159 of the civil code, is exonerated if the order of arrest is erroneously vacated by the district court or the judge thereof on account of the alleged insufficiency of the affidavit upon which the order is issued, and no stay of the order of vacation is granted, as the right to arrest or surrender the defendant given by the statute to the bail as their security is taken away by such vacation and discharge.

Error from Sumner District Court.

ON March 16, 1882, *The Baker Manufacturing Company* brought its action against G. W. Knotts and H. Wallace,

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partners as Knotts & Wallace, for the recovery of two thousand and nine dollars and sixty cents, upon an account for goods, wares and merchandise. Summons was issued and the defendants were legally served. At the issuance of the summons, an order of arrest was issued in the case, and thereon G. W. Knotts was arrested and held in custody until the execution of a bail-bond, signed by himself and *L. H. Fisher, W. O. Barnett, E. L. Brown, J. W. Fisher, and J. R. Messerly*, as sureties; thereupon Knotts was released. On March 22, 1882, the order of arrest was vacated and set aside by the judge of the district court, on account of the alleged insufficiency of the affidavit upon which the order was issued. The judge refused to allow the plaintiff to amend the affidavit, and this ruling was excepted to. The case was then brought to this court by a proceeding in error, and the ruling of the district judge reversed. This court held "that the judge had power to permit the amendment, and under the circumstances ought to have done so; for the affidavit, if not sufficient, certainly showed dishonesty on the part of the defendants." (*Baker Mfg. Co. v. Knotts*, 30 Kas. 356.)

On April 8, 1882, the plaintiff recovered judgment against Knotts & Wallace for the sum of two thousand and seventeen dollars and twenty-four cents, and also for \$28.28 costs. On September 29, 1883, in pursuance of the mandate of this court, and by leave of the district court, plaintiff filed an amended affidavit for an order of arrest. On October 5, 1883, the plaintiff sued out an execution upon the judgment, against the person of G. W. Knotts, directed to the sheriff of Sumner county. On November 30, 1883, the sheriff made return upon this order, that he was unable to find Knotts within his county. The amount due upon the judgment at the commencement of this action was two thousand and seventeen dollars and twenty-four cents, with interest from April 8, 1882, at seven per cent. per annum, and costs.

The bail-bond is in words and figures as follows:

"Know all men by these presents, that G. W. Knotts, as principal, — as sureties, are held and firmly bound unto

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the Baker Manufacturing Company in the full sum of four thousand nineteen and 20-100 dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, forever. The condition of the above obligation is such, that whereas, the above Baker Manufacturing Company has begun a civil action in the district court of Sumner county, Kansas, against the firm of Knotts & Wallace, for the sum of two thousand and nine and 60-100 dollars; and whereas, the Baker Manufacturing Company has filed its affidavit charging the said Knotts & Wallace with fraud in disposing of their goods and merchandise; and whereas, the above-bounden G. W. Knotts, (member of the firm of said firm Knotts & Wallace,) has been arrested under an order of arrest issued by the clerk of said district court: now, therefore, if judgment shall be rendered in said action against said Knotts & Wallace, said G. W. Knotts will render himself amenable to the process of said court, then and in that event, this obligation shall be null and void; otherwise to remain in full force and effect in law.

Witness our hands, this 16th day of March, 1882: G. W. Knotts, L. H. Fisher, E. L. Brown, J. W. Fisher, W. O. Barnett, J. R. Messerly.

"Approved March 17, 1882.

J. M. THRALLS, *Sheriff*."

The plaintiff brought its action to recover upon this bond, setting up all the foregoing facts. To its petition the defendants filed a demurrer, alleging that the same did not state facts sufficient to constitute a cause of action. On April 16, 1884, this demurrer was sustained. Thereupon judgment was rendered against plaintiff. It brings the case here.

Campbell & Dyer, for plaintiff in error.

McDonald & Parker, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: The question in this case is, whether the bail have been exonerated from the obligation of the undertaking executed by them March 17, 1882. Judgment was rendered against Knotts & Wallace on April 8, 1882, and Knotts, who was released at the time of the execution of the

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undertaking, has not rendered himself amenable to the process of the court below. It appears that he cannot be found in Sumner county. If the terms of the undertaking solely, controlled, the bail would be charged; but §§ 168, 169 and 170 of the code are very important in the consideration of this question. These sections are as much a part of the undertaking as if their terms were incorporated therein. Section 168 provides: "That the bail may surrender the defendant to the sheriff at any time before the return-day of the summons in an action against the bail;" and section 169 authorizes the arrest of the defendant by his bail, at any time, for the purpose of surrender. Section 170 further provides: "The bail will be exonerated . . . by his [defendant's] legal discharge, or his surrender to the sheriff of the county in which he was arrested."

On March 22, 1882, the judge of the district court vacated the order of arrest on account of alleged insufficiency of the affidavit upon which the arrest was made. At the time of the vacation of the order of arrest, the plaintiff asked leave to make the affidavit sufficient, by amendment, but leave was refused, the judge holding that he had no power at chambers to grant leave to amend. To this ruling the plaintiff excepted, and on March 20, 1883—nearly a year after the discharge of the defendant—filed its petition in error in this court to review such ruling. On September 6, 1883, the opinion of this court was handed down, reversing the ruling of the district court, and remanding the case with instructions to the court to permit the amendment of the affidavit. No stay of the ruling of the district court was obtained by the plaintiff, and from March 22, 1882, until September 6, 1883, the bail had no legal right to arrest or surrender the defendant; the sheriff had no right to hold him even for an instant, and had no right to accept his surrender from the bail; therefore the right to arrest and surrender their principal given by the statute to the bail as their security, was by the statute taken away when the defendant Knotts was discharged, on March 22, 1882. The sureties executed the undertaking signed by them, upon

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the faith of the provisions of the law that permitted them at any time to arrest and surrender the defendant. The discharge of the defendant, on March 22, 1882, exonerated the bail. At that time the defendant Knotts was entitled to his immediate discharge, and neither the bail nor the sheriff had any custody or control of him. (*Duncan v. Tindall*, 20 Ohio St. 567.)

The judgment of the district court will be affirmed.

All the Justices concurring.

JOHN SEATON, *et al.*, v. G. C. HIXON & Co.

1. *ACTION, Prematurely Brought; Judgment, No Bar.* Where an action to foreclose a lien for materials furnished for a building is prematurely brought, and the judgment is rendered in the case against the plaintiff for that reason, *held*, that such judgment is not a bar to another action brought subsequently and within proper time against the same parties to foreclose the same lien.
2. *NEW ACTION, Not Barred.* And where the plaintiff commenced his second action within less than one year after his failure in the first action, though more than one year after the building was completed, *held*, that by virtue of the provisions of § 28 of the civil code, the action is not barred by the one-year limitation prescribed by § 4 of the mechanics-lien law.
3. ——— *Sufficient Description of Real Estate.* Where a description of real estate is true in every particular, and no other property answers to such description, and the property may easily be found by anyone who may be acquainted with such description and with the facts which exist and which may easily be ascertained upon inquiry, *held*, that the description is sufficient; and *further held*, that the description in the present case is sufficient.

Error from Atchison District Court.

ACTION by *G. C. Hixon & Co.* against *Seaton* and others, to foreclose a mechanics' lien. Trial at the June Term, 1884, and judgment for plaintiffs. The defendants bring the case here. The material facts are stated in the opinion.

35	663
37	52
39	474
35	663
40	375
35	663
43	468
43	625
35	663
45	160
35	663
49	771
35	663
54	591
35	663
68	192
35	663
69	64
35	663
670	197
35	663
71	541
35	663
75	11
35	663
75	11
76	92
35	663
81	239

Everest & Waggener, and Tomlinson & Eaton, for plaintiff in error Seaton.

W. W. Guthrie, and Jackson & Royse, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by G. C. Hixon and A. W. Pettibone, partners as G. C. Hixon & Co., in the district court of Atchison county, against William Sanderson, James P. Tracy, and John A. Tracy, partners as Sanderson & Tracy, and John Seaton, to foreclose a mechanics' lien for the value of materials furnished by the plaintiffs, as sub-contractors, to Sanderson & Tracy, the contractors, and placed in a building upon land owned by Seaton. On April 13, 1880, the building was completed. On May 6, 1880, the plaintiffs filed in the proper office their affidavit for a lien upon the land on which the building was situated, and on the same day commenced an action in the district court against the aforesaid defendants to foreclose such lien, which action was consolidated with three other cases of like character, brought by other plaintiffs against the same defendants. On August 4, 1881, this consolidated action was tried, and in such action judgment was rendered in favor of the plaintiffs, G. C. Hixon & Co., and against Sanderson & Tracy, for the amount of their claim against them; and judgment was further rendered against the plaintiffs G. C. Hixon & Co. and in favor of Seaton, denying their right to foreclose their lien, upon the ground and for the reason only that the plaintiffs had commenced their action prematurely and within less than sixty days after the completion of said building. This judgment was afterward affirmed by the supreme court. (*McDonald v. Seaton*, 27 Kas. 672.) On May 29, 1882, this present action was commenced. The plaintiffs' petition set forth the foregoing, among other facts. To this petition the defendant, John Seaton, demurred, upon the ground that the petition did not state facts sufficient to constitute a cause of action. This

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demurrer was overruled by the court. The defendant, John Seaton, then filed an answer to the plaintiffs' petition, setting forth in substance: First, a general denial; second, a special denial as to the ownership of the property; third, a plea of a former adjudication of the matter in controversy; fourth, a plea of a certain statute of limitations. The plaintiffs replied to this answer. The other defendants made default. On July 22, 1884, this action was tried upon the foregoing pleadings before the court without a jury, and the court found special conclusions of fact and of law, and upon these conclusions rendered judgment in favor of the plaintiffs and against the defendant Seaton for the foreclosure of plaintiffs' lien, and all the defendants, as plaintiffs in error, have brought the case to this court. The only controversy, however, in this court, is between the plaintiffs, G. C. Hixon & Co., who are now defendants in error, and Seaton.

It is claimed that the court below erred in overruling the demurrer of the defendant Seaton, and also erred in its conclusions of law. But the real questions presented by counsel are as follows: (1.) Is the judgment rendered in the first action brought by G. C. Hixon & Co. a bar to the prosecution of this present action? (2.) Is this present action barred by the one-year limitation prescribed by § 4 of the mechanics-lien law? (3.) Is the description of the property, as set forth in the plaintiffs' statement for a lien, sufficient, or is it too indefinite and uncertain? These questions we shall consider in their order.

I. Is the judgment rendered in the first action a bar to the prosecution of the present action? Does such judgment amount in effect to a "*res adjudicata*"? We think not. Such judgment was nothing more than that the first action as between the plaintiffs, G. C. Hixon & Co., and John Seaton, for the foreclosure of the plaintiffs' lien, was brought prematurely; that it was brought within less than sixty days after the completion of the building, which, under the statutes, is too soon, (Mechanics-lien law, § 2; Comp. Laws of 1879, ¶ 4169.)

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II. Is the present action barred by the one-year limitation prescribed by § 4 of the mechanics-lien law? We think not. That limitation requires that an action to foreclose the lien shall be commenced within one year after the building has been completed; but it also provides that "the practice, pleadings and proceedings in such action shall be in conformity with the rules prescribed by the code of civil procedure, so far as the same are applicable." (Comp. Laws of 1879, ¶ 4171.) And § 23 of the code of civil procedure reads as follows:

"SEC. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure."

It is claimed by counsel for Seaton that the words "within due time," as used in the foregoing section, mean a time within which the action may be prosecuted, a time not too soon nor too late, and mean only such time; and therefore that as the first action was commenced prematurely and before the action could have been prosecuted as against Seaton, the action was not commenced "within due time," and therefore that this action does not come within the saving clause of said § 23. We do not think that the words "within due time," as used in the foregoing section, have the full meaning which counsel for Seaton claim they have. These words are used with reference to the full running of statutes of limitations and the absolute barring of actions thereby, and not with reference to anything else. All that they require to bring the action within said § 23, is that the action shall be commenced before any statute of limitations has barred a recovery. If the action is commenced before it has been barred by any statute of limitations, then it is commenced "within due time" within the meaning of the foregoing section; but if it is not commenced until after it has been barred, then it is not commenced "within due time." In the present case this second action was brought

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within less than one year after the plaintiffs' failure in the first action in the district court, and within less than one year after their failure and the affirmance of the judgment in the supreme court; and hence we do not think that this present action is barred by the limitation prescribed by § 4 of the mechanics-lien law.

III. Is the description of the property, as set forth in the plaintiffs' statement for a lien, sufficient, or is it too indefinite and uncertain? This statement describes the property as being in the city of Atchison, Kansas, and the property upon which the aforesaid building was erected, and as owned by John Seaton, and as "lots 15 and 16, block A A, corner Q and South Fourth streets." We think the description is amply sufficient under the findings of the court. The description is true in every particular; no other property answers to this description, and the property may easily be found by anyone who may be acquainted with this description and with the facts which exist, and which may easily be ascertained upon inquiry. Such a description, when it can be so aided by existing facts, is always sufficient. The property is in the corporate limits of the city of Atchison, although it is also in an addition to that city, south of the original boundaries of the city, and is usually described or designated as "South Atchison." In such addition there is a block designated as "A A," and there is no such block in any other part of the city, or in any other addition thereto. The southwest corner of said block A A is at the northeast corner of the intersection of Fourth and Q streets, and the last-named street is situated wholly within the foregoing "South Atchison" addition, and there is only one "Fourth street" in Atchison, a part of which is in "South Atchison," and of course "South Fourth street" must be in "South Atchison." The description of the property contained in the deed of conveyance under which John Seaton claims, is as follows:

"That part of block A A of South Atchison, [an addition to the city of Atchison,] commencing at the southwest corner, running 75 feet north, thence 150 feet east, thence 75 feet

Finley v. Funk.

south, thence 150 feet west, to the place of beginning, said plat of ground being known on the official plat of the city of Atchison as lots 15 and 16, of block A A."

We presume that lots 15 and 16, in block A A, South Atchison, have well-defined and well-known or easily-ascertained boundaries, and that such boundaries are specifically shown by the official plat. There is certainly nothing in the record showing the contrary.

Finding no material error in the rulings or judgment of the district court, its judgment will be affirmed.

All the Justices concurring.

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JAMES T. FINLEY V. ADAM FUNK.

1. **DISPUTES, Which may be Arbitrated.** All controversies of a civil nature, including disputes concerning real estate, may be the subject of arbitration. (*Stigers v. Stigers*, 5 Kas. 662, referred to, and disapproved.)
2. **SETTLEMENT OF DISPUTE — Consideration — Valid Contract.** A dispute had long existed between the plaintiff and defendant in regard to the boundary line running north and south, dividing two contiguous tracts of land which they owned. The defendant claimed that a certain hedge was standing upon the true line, while the plaintiff claimed that it was three rods farther east. A written agreement was finally entered into establishing the boundary on the line claimed by the defendant. As a part of the contract, the defendant agreed to pay the plaintiff for the strip of land lying between the established line and the one claimed by the plaintiff, which was ascertained to be two and one-half acres, the value thereof to be fixed by arbitration. *Held*, In an action on the agreement to recover the value of the land, that the mutual concessions of the parties in fixing the disputed boundary line, and the relinquishment by the plaintiff of his claim to the disputed strip of land, is sufficient consideration to support the defendant's promise to pay the value of the strip, and that the contract is valid, and should be upheld.

Error from Labette District Court.

ACTION brought by *James T. Finley* against *Adam Funk*, to recover the sum of \$300, alleged to be due under a certain agreement, which is set out at length in the petition. The petition and agreement are as follows :

"The plaintiff, *James T. Finley*, for cause of action against the defendant, *Adam Funk*, alleges that he, the plaintiff, is the owner of the S.E. quarter of section 26, township 31, range 17, Labette county, Kansas; that the defendant was at the date first hereinafter mentioned the owner of the S.W. quarter of said section; that for many years past there has been a difference between plaintiff and defendant relative to the true location of the quarter-section corner on the south line of said section, the same being the corner marking the south end of the dividing-line between the land owned by plaintiff and defendant as above described, and the true location of said line has been doubtful and uncertain, the plaintiff as he believed rightfully claiming to own the land up to a line running to a point equidistant from the S.E. and S.W. corners of said section, and the defendant claiming to own the land up to a line running to a point three rods east of said central point, which would make his quarter-section about six rods longer on its south line than plaintiff's quarter-section.

"And the plaintiff alleges that the same question as to the true location of said quarter-section corner existed between *J. B. Swart* and *H. Bouton*, land-owners in the north half of section 35, lying immediately south of said section 26; that the county surveyor of said county, pursuant to notice received from said *J. B. Swart*, had notified all of said parties that on the 12th day of June, 1884, he would establish said corner; that at the time named all of said parties were present, and said *Swart* and *Funk* had made and submitted to said surveyor certain affidavits, and the plaintiff and the said *Bouton* had submitted a portion of their evidence, when a difference arose as to the right of plaintiff and *Bouton* to have inspection of the affidavits submitted by *Swart* and *Funk*, the plaintiff claiming the right to look at said affidavits, and the surveyor refusing them permission to do so; that thereupon plaintiff and *Bouton* refused to proceed further with their evidence before said surveyor, and stated that they would appeal

Finley v. Funk.

from any report thereof which said surveyor might make adverse to their interests; that thereupon all of said parties agreed to dispense with the services of said county surveyor in establishing said corner, and as a means of avoiding all difficulties and litigation concerning the location of said corner, entered into and executed the written agreement, a copy of which is hereto attached, marked 'A,' and made a part hereof; and said corner-stone was thereupon by said parties located and established in conformity with said agreement, and defendant Funk has ever since been in the quiet and undisputed possession and control of the strip of land described.

"And plaintiff alleges that said county surveyor computed the quantity of land for which defendant agreed to pay as aforesaid, and the same amounted to $2\frac{1}{2}$ acres, and there were and are in fact two and one-half acres in said strip; that plaintiff has in all respects on his part complied with the provisions of said agreement, and in pursuance thereof, selected an arbitrator to value said land as agreed, and the defendant also selected one, but afterward the defendant wrongfully and without cause induced the arbitrator selected by him to refuse to act in the matter, and since then the defendant has refused to select another arbitrator, and has notified plaintiff that he will not submit the valuation of said land to arbitration as provided by said agreement, and that he will not pay for the same, and has ever since refused to pay for said land or to submit the question as to the value thereof to arbitration as agreed, though often requested by plaintiff so to do, all to the great damage of plaintiff in the sum hereinafter named.

"And plaintiff alleges that on the 30th day of June, 1884, said county surveyor filed in the office of the register of deeds in and for said county, a plat and notes of said survey establishing said quarter-section corner at the point agreed upon, the same as if said corner had been established by him upon the evidence instead of upon the agreement of the parties as aforesaid, and by reason of the facts hereinbefore set forth, no appeal has been taken therefrom; that the value of the land in said strip for which defendant agreed to pay as aforesaid, is, and was at the date of said agreement, not less than \$300.

"Wherefore, plaintiff asks judgment for the sum of \$300, together with interest and costs."

"A."

"Articles of agreement between J. B. Swart, owner of the N.W. quarter of section 35, township 31, range 17, Labette

Statement of the Case.

county, Kansas, and H. Bouton, owner of the west half of the N.E. quarter of the same section; and J. T. Finley, owner of the S.E. quarter, and Adam Funk, owner of the S.W. quarter of section 26, township 31, range 17, in said county and state, witnesseth:

"Whereas, there has heretofore been a dispute and question about the location of the quarter-section corner common to the land described on the line between said sections 26 and 35; now it is agreed that—

"1. Said quarter-section corner of said line between said sections 26 and 35 shall be, and hereby is, forever established on a line with the hedges dividing the land of said Swart and Bouton and Funk and Finley.

"2. Said Swart shall pay to said Bouton the value of the strip of land lying west of the hedge between the said lands of said Swart and Bouton, and east of a line drawn or extended southerly from a point this day by actual measurement, found to be equidistant between the N.E. and N.W. corners of said section 35, toward the quarter-section corner in the south line of said section.

"3. Said Funk shall pay to said Finley the value of the strip of land lying west of the hedge between the land of Funk and Finley, and east of a line extended northerly from the point this day ascertained to be equidistant from the S.E. and S.W. corners of said section 26, toward the quarter-section-corner on the north line of said section.

"4. All parties agree that the county surveyor shall compute the quantity of land in each of the strips described, and the value thereof shall be fixed by three disinterested arbitrators, one to be chosen by Swart and one by Bouton, and the two to choose a third, for the land in section 35; and one to be selected by Finley and one by Funk, the two so chosen to select a third, for the land in section 26; one set of arbitrators may value the land in each section, if agreed; and all parties hereby agree to abide the decision of said arbitrators, and said Swart and Funk agree to pay the amount of their respective awards within ten days from the date of such award. Arbitrators to be selected within ten days from the date hereof. The parties to whom said awards are to be paid as above provided may declare this contract void as far as it affects them, unless said awards are paid as above provided, or they may

Finley v. Funk.

enforce said awards by any proceedings necessary to collect the same.

"Dated this 11th day of June, 1884.

[Signed]

J. B. SWART.

ADAM FUNK.

JAS. T. FINLEY.

H. X BOUTON, (his X mark)."

The defendant filed an answer, to which the plaintiff replied. At the trial of the cause at the November Term, 1883, the defendant objected to the introduction of any evidence under the petition, on the ground that it did not state facts sufficient to constitute a cause of action. This objection was sustained, and judgment rendered in favor of the defendant for costs, to which ruling and judgment an exception was taken by the plaintiff, who brings the case here for review.

C. H. Kimball, for plaintiff in error.

Perkins & Morrison, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: Two principal reasons are urged against the sufficiency of the petition, the first of which is that the cause of action attempted to be set forth is based on an agreement to arbitrate a dispute concerning real estate; and it is argued that such a dispute is not the subject of arbitration. This position cannot be maintained. It seems that in an early day there was some doubt whether controversies concerning land could be submitted to arbitration, but this doubt can hardly be said to exist now. In discussing what may be the subject-matter for submission, Mr. Morse, in his work on Arbitration and Award, says:

"In England, in old times, the right to submit to arbitration disputes concerning real estate, especially where the actual title was in dispute, was regarded with great jealousy, but any doubt concerning the validity of such submissions has been long since entirely dissipated. In the United States few traces of the ancient doctrine are to be found, and there is no question that any dispute whatsoever relating to realty may be submitted to arbitration."

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And he cites numerous authorities to sustain the conclusion which he has reached. (Morse on Arb. and Award, 54.) Mr. Caldwell, in his treatise on Arbitration, page 3, after speaking of the doubt which formerly existed upon the question, concludes as follows:

“Indeed, at the present day it is quite clear that any disputes concerning land may be referred to arbitration, and that one party may be directed to execute all the necessary conveyances to the other, and to perform all such acts as may be requisite to confer the right and the possession.”

The only case cited to sustain the objection is that of *Stigers v. Stigers*, which is noted in the appendix of 5 Kas. at page 652. No opinion was written in the case, and the grounds upon which the decision was based cannot now be definitely ascertained. It appears to have been an action to recover real estate, and the plaintiff offered in evidence an arbitration bond executed by the parties, and an award of the arbitrator, which were excluded by the court for reasons not stated. It is true the syllabus of the case as it is reported, sustains the view contended for by the defendant; but whether the syllabus was prepared by the justice who pronounced the decision in the case, or by the reporter, is not known. At the time the decision was made, there was no statute, as there is now, providing that the justice delivering the opinion shall prepare and file a syllabus of the points decided in the case. The syllabus of the case, by whomsoever prepared, states a doctrine which is in conflict with well-settled law that we cannot approve or follow. If there was ever any doubt in this state of the right to submit such controversies to arbitration, it has been settled by recent legislation. In 1876 it was enacted, “That all persons who shall have any controversy or controversies may submit such controversy or controversies to the arbitration of any person or persons to be mutually agreed upon by the parties.” (Laws 1876, ch. 102, § 1.) The language of this provision is broad and inclusive, and covers disputes concerning real estate equally with disputes relating to personal property.

1. Disputes which may be arbitrated.

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The other objection to the petition is, that it fails to show that the plaintiff ever had any interest in the strip of land for which he demands payment, or that he relinquished any right thereto to the defendant, or that the defendant received anything at his hands that he was not already entitled to, and therefore that there was no consideration for defendant's agreement to pay for the disputed strip of land. From the petition it appears that the plaintiff and the defendant were the owners of adjoining tracts of land, the plaintiff owning the southeast quarter of section 26, and the defendant the southwest quarter of the same section. For many years a dispute existed between them relating to the true location of the boundary line dividing these tracts. Finley claimed that the true line of division was one lying equidistant from the east and west lines of the section, while Funk claimed that his land extended to a line three rods east of the middle boundary as claimed by Finley, which would make Funk's quarter-section six rods longer on its south line than Finley's quarter-section. On the 12th of June, 1884, they undertook to have the boundary line established by the county surveyor, as provided by statute, but a dispute arising as to the procedure, they agreed to dispense with the services of the county surveyor in establishing the corner, and they fixed upon a boundary line by an agreement between themselves. The agreement was in writing, and by it the boundary was established on the line contended for by Funk, and upon which a hedge was standing. As a part of the agreement, it was stipulated that—

“Said Funk shall pay to said Finley the value of the strip of land lying west of the hedge between the land of Funk and Finley, and east of the line extended northerly from the point this day ascertained to be equidistant from the southeast and southwest corners of said section 26, toward the quarter-section corner on the north line of said section.”

It was stipulated that the county surveyor should compute the quantity of land in the strip described, and its value was to be determined by three arbitrators, one to be chosen by Finley and the other by Funk, and the two so chosen to select

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a third, and the parties agreed to abide by the decision of these arbitrators, and that Funk should pay the amount of the award within ten days from the time it was made; and that unless the award was paid in the time stated, Finley was at liberty to declare the contract void so far as it affected him, or he might enforce it by any proceeding necessary to collect the same. It is alleged that the county surveyor computed the quantity of land in the strip, and found that it amounts to two and one-half acres; that the plaintiff has complied in every respect with the provisions of the agreement, but that the defendant has refused to select an arbitrator, and has notified the plaintiff that he will not pay for said land nor submit the question as to the value thereof to arbitration as agreed; and that the value of the land included in the strip was \$300. This agreement is somewhat ambiguous in its terms, but the majority of the court are of the opinion that it is valid, and that the petition states a cause of action. The view taken by the court is that all the provisions of the agreement must be taken together, and if by any reasonable construction it can be upheld, it should be done. By this agreement the parties sought to settle a perplexing question of boundaries, and avoid what might be a protracted and expensive litigation. The agreement is one they had a right to make, and its purpose is looked upon by the courts with favor. It has been said in a case where disputed boundary lines were involved, that—

“It is the policy of the law to allow parties to settle and adjust doubtful and disputed facts between themselves, and when such a matter which before was uncertain, has been established by agreement between the parties upon good consideration passing between them, they are not permitted afterward to deny it.” (*Vossburgh v. Teator*, 32 N. Y. 567.)

The fact that the parties entered into an agreement is evidence that they desired as far as possible to waive and dispense with formalities; and even if the agreement is formally defective, the court should seek to uphold it and carry out the obvious intent of the parties. The defendant claimed that his land extended to the hedge, while the plaintiff insisted that the

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hedge stood three rods over on his land. They employed a surveyor, and testimony was taken in an ineffectual effort to ascertain the true line. The line was fixed, and the defendant, as a settlement of the question, agreed to pay the value of the disputed strip. The consideration for the agreement, as the plaintiff contends, is the mutual concessions of the parties in fixing the dividing-line, and the abandonment by the plaintiff of any claim to the disputed strip, which is deemed by the court to be sufficient to sustain the defendant's promise. The other view, and the one entertained by the writer of this opinion, is that the agreement was without consideration, and is invalid. The subject of the controversy between the parties was, where was the true line of division between their farms? It was expressly agreed by them that the boundary is forever established on a line with the hedge, which by another provision of the agreement is said to divide the land of Funk and Finley. It seems to me that the parties did not seek to make a new boundary line, nor to change the old line, but only undertook to find and fix the pre-existing line—the true line of division between the two quarter-sections. The land lying west of this line, including the strip in question, was owned by Funk, and in which Finley had no interest. He owned no more than the southeast quarter-section, which extended westwardly to a hedge, and no farther, and he therefore had no interest in the strip west of the hedge, nor in any part of the southwest quarter, to convey. It is true that Funk agreed to pay Finley the value of two and one-half acres of land, and we should, if possible, uphold the agreement, and give effect to the apparent purpose of the parties; but no agreement can be upheld that is not founded upon a valid and sufficient consideration. The stated and only consideration for the promise of Funk is the two and one-half acres of land which, as we have seen, he already owned, and in which the plaintiff had no interest to convey. If the agreement is interpreted as showing that the parties regarded the line three rods east of the hedge to be the true one, and that the land included in the strip belonged to Fin-

2. Settlement of
dispute—con-
sideration—
valid contract.

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ley, which from the language employed would seem to be a strained interpretation, it would still fail of its purpose. In the opinion of the writer, the agreement is not effective as a conveyance, and would not operate to transfer the title of the disputed strip of land to the defendant. It is not alleged in the petition that any deed or instrument which would operate as a conveyance of any part of plaintiff's quarter-section had been tendered to the defendant.

Another point presented against the petition by the defendant is, that it contains an allegation that the surveyor proceeded with the survey alleged to have been begun by him, and filed his plat and notes with the register of deeds, showing that the corner was established on the evidence produced before him instead of upon the agreement of the parties, and it is claimed that that survey is conclusive upon the parties. This point is answered by the allegation that the services of the surveyor in establishing the corner were dispensed with, and that the line was established by the agreement, which is here held to be valid. The action of the surveyor was taken subsequently to this agreement, and is not binding upon the plaintiff.

From the conclusion reached, it follows that the ruling of the district court, holding the petition to be insufficient, must be held erroneous, and its judgment will therefore be reversed, and the cause remanded for another trial.

All the Justices concurring, except as to the second paragraph of the syllabus, in which Justice JOHNSTON does not concur.

35	678
36	85
37	684
38	678
53	38

In the Matter of the Petition of C. F. W. DASSLER for a Writ of Habeas Corpus.

1. **SECTION, Construed as Subdivision.** The word "section" used in paragraph or subdivision 34 of § 11, article 3, chapter 37, Laws of 1881, is to be construed as meaning "subdivision, or subsection."
2. **ROAD LEVIES, Not Debts.** Road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract.
3. **ROAD WORK, Not Involuntary Servitude.** The performance of work upon an assessment or levy payable in labor for the repair of roads or streets, is not that kind of involuntary servitude intended to be embraced within the provisions of the constitution of the state, or of the United States.
4. **STREET LABOR, Not a Tax on Right to Vote.** The satisfaction of an assessment or levy of labor to keep the streets in repair in cities of the first class, is not a prerequisite of registration, and in no sense can it be said that said assessment or levy is a tax, or an embargo upon the right to vote, although the list of registration is one of the methods of ascertaining who are liable to work upon the streets.
5. **ROAD DISTRICT; Later Statute Controls.** Where the legislature has by the passage of a later statute constituted each city of the first class a separate road district, and given such cities full control over the labor to be performed upon its streets, and authorized ordinances to be enacted to enforce the same, the later statute is controlling, as it is a substitute for the prior statute, so far as it conflicts therewith.

Original Proceedings in Habeas Corpus.

ON January 12, 1885, there was filed in this court, on behalf of *C. F. W. Dassler*, a petition for a writ of *habeas corpus*. The petition sets forth the following facts:

"1. Your petitioner is restrained of his liberty by one W. D. Shallcross, of Leavenworth, Kansas, who is the city marshal of the city of Leavenworth, Kansas, a city of the first class; said petitioner is restrained of his liberty by said city marshal, in the city and county of Leavenworth, in the state of Kansas, and in the city jail thereof.

"2. The cause or pretense of the restraint of this petitioner, according to the best of the knowledge and belief of the applicant, is as follows: On December 30, 1884, this petitioner

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was arrested by a policeman of said city of Leavenworth, upon a warrant issued by the police judge of said city, upon a complaint, of which the following is a copy:

"THE STATE OF KANSAS, CITY AND COUNTY OF LEAVENWORTH.—*Police Court, sct.*—The City of Leavenworth v. C. F. W. Dassler.—W. D. Shallcross, being duly sworn, deposes and says: That C. F. W. Dassler is now and has been ever since January 1, 1884, a male resident and citizen of said city of Leavenworth, and is now and was during all of said time between the ages of twenty-one and forty-five years, and a registered voter of said city, and that said Dassler unlawfully neglects and refuses to perform two days' labor, or any part thereof, upon the streets, alleys and avenues of said city, and also unlawfully neglects and refuses to pay to the street commissioner of said city the sum of three dollars, or any part thereof, in lieu of said labor, and has during all of the time since January 1, 1884, so neglected and refused to perform said labor or pay said money in lieu thereof, although duly notified in writing so to do by the street commissioner of said city; and further saith not.

[Signed]

W. D. SHALLCROSS.

"Sworn to before me, and subscribed in my presence, this 30th day of December, 1884.—M. L. HACKER, *Police Judge.*"

"On the 31st day of December, 1884, the case against said petitioner on said complaint was called for trial, and the petitioner moved to quash said complaint, because the same did not state a public offense under the constitution and laws of the state of Kansas, or the laws or ordinances of said city, and because said city of Leavenworth had no power to arrest, fine and imprison the petitioner for the non-payment of the road tax in said complaint mentioned, which motion was, by the police judge of said city, overruled. (A copy of the ordinance of said city of Leavenworth, in reference to the collection of road tax, is hereto attached, made a part hereof, and marked 'Exhibit A'.) Thereupon said police judge, under protest of petitioner, proceeded to try the case, hear the evidence, and adjudged the petitioner guilty, and adjudged that petitioner pay a fine of five dollars, and stand committed to the city jail until said fine be paid, and issued a mittimus to the said W. D. Shallcross to that effect; and said petitioner was thereupon so imprisoned and restrained of his liberty by said city marshal, and still continues in said restraint, this petitioner refusing to pay said fine.

"3. The illegality of the said restraint consists in this, that—1st. Neither the said city of Leavenworth, nor said police judge, has power to enforce the collection of said road tax by arrest, fine and imprisonment; 2d. That if there be any pretended law on the statute book to that effect, the same is unconstitutional, null and void; 3d. That said police judge had no power to render the judgment for a fine, nor to issue a

In re Dassler, Petitioner.

commitment to enforce the collection thereof; 4th. That the said ordinance under which said complaint was issued, and said proceedings were had, is void, so far as it provides for the arrest, fine and imprisonment of persons for the non-payment of road taxes; 5th. That the ordinance is repugnant to the constitution and laws of the state of Kansas.

"Wherefore, petitioner prays that his said imprisonment be inquired into, and if found illegal, that he be discharged therefrom."

EXHIBIT A.

"AN ORDINANCE RELATING TO LABOR ON THE STREETS OF LEAVENWORTH CITY.

"*Be it ordained by the Mayor and Councilmen of the City of Leavenworth:*

"SECTION 1. (Repealed by ordinance 1044, post, § 905.)

"SEC. 897.—*City Clerk.* Sec. 2. The city clerk shall deliver one copy of the duplicate list of persons registered, which he is required to make out by the thirty-fourth subdivision of section eleven of the city charter, to the street commissioner, and the other copy thereof to the city treasurer.

"SEC. 898.—*Street Commissioner.* Sec. 3. After the duplicate list of persons registered has been delivered to the street commissioner, he shall from time to time, as work may in his judgment, or upon order of the city council, be required to be done, notify the persons upon said list, or so many thereof as may be necessary, to report to him at a time and place in said notice specified, which notice shall be either printed or written, or pay to him at said time and place the amount of money due for any delinquency in work, the same being for not less than one full day's labor.

"SEC. 899.—*Same.* Sec. 4. The street commissioner shall also notify all other persons specified in the first section of this ordinance, whose names are not included in the list of registered persons in the same manner as herein provided for persons registered, and such persons shall be subject to all of the provisions of this ordinance, and the names of such additional persons shall be by the street commissioner forthwith furnished to the city treasurer.

"SEC. 900.—*Same; Failure.* Sec. 5. Upon the failure of any person notified as herein prescribed, and no valid excuse being given to appear and perform said labor, or upon a failure to pay to the street commissioner the amount to be paid for such delinquency, the street commissioner shall mark opposite to his name upon the list furnished him by the city clerk, or made by himself, the words 'Notified and failed,' and such persons so failing shall, on due conviction thereof before the police judge, be fined in a sum not less than three dollars nor more than ten dollars for each day he so fails or refuses to work or to pay therefor, and the list of said street commissioner so marked 'Notified and failed,' shall be *prima facie* evidence of such notification and failure.

"SEC. 901.—*Receipt.* Sec. 6. Upon doing the work required or payment of the money specified in this ordinance to be paid to the street commissioner, he shall mark on said list the words, 'Notified, worked, or paid,' and give the person so working or paying a receipt therefor.

"SEC. 902.—*Arrest.* Sec. 7. It shall be the duty of the street commissioner to turn over the list of delinquents on Monday of each week to the city marshal, who shall thereupon cause such persons to be ar-

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rested and brought before the police judge for trial under provisions of this ordinance.

"**Sec. 903.—Moneys.** Sec. 8. It shall be the duty of the street commissioner to turn over every day all moneys collected by him to the city treasurer, during the preceding one, and once each week to furnish the city treasurer with a list of those persons who have either performed the labor or paid the amount required by section one of this ordinance, and those who have been temporarily excused. The city treasurer shall furnish the city council at each regular meeting a true copy of all reports filed with him by the street commissioner since their last meeting.

"**Sec. 904.** Sec. 9. Any failure upon the part of the street commissioner or city marshal to perform their duties as specified in this ordinance shall be deemed sufficient cause for dismissal from office.

"**Sec. 10.** This ordinance shall take effect and be in force from and after its approval and publication.

"Approved, April 22, 1881; published, April 23, 1881."

"(1044.) AN ORDINANCE amending and repealing section one of ordinance No. 1008, entitled 'An ordinance relating to labor on the streets of Leavenworth city,' approved April 22, 1881.

"*Be it ordained by the Mayor and Councilmen of the City of Leavenworth:*

Sec. 905.—Street Labor. Sec. 1. That section 1 of ordinance No. 1008, entitled 'An ordinance relating to labor on the streets of Leavenworth city,' approved April 22, 1881, be amended so as to read as follows: 'Sec. 1. Each male resident of the city of Leavenworth between the ages of twenty-one and forty-five years is hereby required in his own proper person each year, upon notice from the street commissioner, his deputy, or an officer appointed for that purpose, to perform two days' labor of ten hours each, on the streets, alleys or avenues of said city, under the direction and control of the street commissioner, or his deputies, or in lieu thereof shall pay to the street commissioner the sum of one dollar and fifty cents for each day.

"**Sec. 906.—Sec. 2.** The original section one of this ordinance above referred to, is hereby repealed, but all actions and proceedings thereunder shall be carried out, the same as if this repeal had not been made.

"**Sec. 8.** This ordinance shall be in force from and after its publication.

"Approved, October 5, 1882; published, October 7, 1882."

Upon such petition being filed, W. D. Shallcross, the respondent, waived the issuance of the writ and entered his appearance, and for his return stated that C. F. W. Dassler was restrained by him and held in his custody under the proceedings mentioned in the petition.

The opinion herein was filed at the November, 1886, session of the court.

C. F. W. Dassler, petitioner, for himself.

William C. Hook, for respondent.

The opinion of the court was delivered by

HORTON, C. J.: The petitioner was arrested December 30, 1884, under a warrant issued by the police judge of the city of Leavenworth, upon complaint of the city marshal, charging him with refusing to pay what is known as the road tax, sometimes called the poll tax. Before the police court he moved to quash the complaint, which was overruled. Upon the trial, he was adjudged guilty, and assessed to pay a fine of five dollars and stand committed to the city jail until the fine was paid.

After being committed to the city jail, these proceedings were instituted, the petitioner alleging that he is illegally held in custody. He claims that there is no power conferred upon cities of the first class to enforce the collection of road taxes by arrest, fine and imprisonment; that if such alleged power has been attempted to be conferred, it is in conflict with the constitution of the state: (1) Because taxes are debts, and are therefore within the meaning of the constitutional provision abolishing imprisonment for debt; (2) that § 6 of the bill of rights specifies there shall be no involuntary servitude, except for the punishment of crime, within the state, and the power attempted to be conferred violates this provision; (3) by attempting to confer such power, the legislature has imposed additional qualifications upon the citizen to exercise the right of suffrage; and finally, that the ordinance of the city under which the petitioner was arrested is invalid, because it is in conflict with the general statutes in several respects.

The statutory authority for the ordinance relating to labor on the streets of Leavenworth city, under which the petitioner was arrested, is found in paragraph 34, § 11, ch. 37, Laws of 1881, of the act "To incorporate and regulate cities of the first class," and reads as follows:

"Each city shall constitute a separate road district, and the mayor and council are authorized and empowered to compel each male resident of said city between the ages of twenty-one

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and forty-five years to perform two days' labor of ten hours each, on the streets, alleys or avenues of said city, or in lieu thereof to pay to the street commissioner the sum of one dollar and fifty cents per day. The city clerk shall make out and certify to the street commissioner and city treasurer, on or before the first day of April of each year, duplicate lists of persons registered by him as voters, between the ages of twenty-one and forty-five years, and the street commissioner shall collect the sum of one dollar and fifty cents per day from each person so certified by the clerk, or compel such person to perform two days' labor on the streets, alleys or avenues of said city. The street commissioner shall, every forty-eight hours, turn over to the city treasurer all moneys collected by him during said time, together with a list of the persons from whom said money was collected, and shall, once every week, make out and deliver to the city treasurer a list of all persons who have performed their two days' labor on the streets. The city treasurer shall place the money collected by the street commissioner in a special fund, which shall only be applied to the repairs of the streets, alleys or avenues of said city. All work or labor done under the provisions of this section shall be under the superintendence and control of the street commissioner. Each city shall have power to pass all ordinances, and to enforce the same by fine or imprisonment, or both, to carry out fully the provisions of this section."

The word "section" used in said paragraph 34 must be considered to mean "subdivision or subsection." The language of the whole paragraph or subdivision taken together

will bear no other reasonable construction. The final sentence of subdivision 34 is, "each city shall have power to pass all ordinances, and to enforce the same by fine or imprisonment, or both, to carry out fully the provisions of this *section*." The preceding sentence in subdivision 34 is as follows: "All work or labor done under the provisions of this *section* shall be under the superintendence and control of the street commissioner." In both of these sentences the word "section" is to be construed as meaning "subdivision or subsection." Said section 11, which contains the enumeration of powers delegated to the mayor and council, embraces forty-three paragraphs or subdivisions, of which subdivision 34 is one.

1. Section, construed as subdivision.

In re Dassler, Petitioner.

It was decided by this court, in *In re Wheeler*, that "the provision of the constitution declaring 'no person shall be imprisoned for debt except in cases of fraud,' applies only to liabilities arising upon contract;" therefore road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. (34 Kas. 96. See also, 1 Desty on Taxation, 9, 10; Cooley on Taxation, 2d ed., 14; *Amenia v. Stanford*, 6 Johns. 92; *Johnston v. Mayor, &c.*, 62 Ga. 645.)

The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in money in lieu of work, while in the nature of a tax, is not in common speech or in customary revenue legislation, understood as embraced in the term tax. The power to impose this labor is exercised for public purposes, and the general good and convenience of the community. (Cooley on Taxation, 2d ed., *supra*; 1 Desty on Taxation, 296; *Starksboro v. Town of Hindsburg*, 13 Vt. 215; *State v. Halifax*, 4 Dev. 345; *Day v. Green*, 4 Cush. 433; 1 Dill. Mun. Cor., 3d ed., § 394.) Such labor has never been

2. Road levies,
not debts.

regarded or construed by any of the authorities as falling within the terms of the constitution prohibiting slavery and involuntary servitude.

Militia service is also compulsory, and if the theory of the petitioner is correct, such service, when involuntary, is within the terms of § 6 of the bill of rights, and the thirteenth amendment to the constitution of the United States. Such however is not the case, and we do not think that art. 8 of the constitution of this state conflicts in any way with § 6 of the bill of rights or with the thirteenth amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto; among these services are labor on the streets or highways, and training in the militia. As the performance of work upon an assessment or levy, payable in labor for the repair of roads or streets, is not the kind of involuntary servitude evidently in-

3. Road work, not
involuntary
servitude.

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tended to be embraced within the provisions of the constitution of the state or of the United States, the power to impose such labor by the legislature, or a city acting under its authority, cannot well be questioned.

If it be urged against the exercise of this power, that if the legislature has a right to require a man to work two days upon the road or street, it may compel him to work every day of the year, and thereby make him a slave to the state, the answer is sufficient to say that no such case is before us.

The claim that the levy made payable in labor to keep the streets in repair, which may be commuted in money in lieu of work, is a tax upon the right to vote, is not sustained. It is true that no one in a city of the first class can vote unless he is registered, but the satisfaction of the levy for street purposes is not a prerequisite of registration. It is not true that the assessment can only be collected from those who register. The statute authorizes cities of the first class to compel each male resident between the ages of twenty-one and forty-five years to perform the labor complained of, or in lieu thereof, to pay the sum of three dollars. The list of registration is only one of the means of ascertaining who are liable to work upon the streets of the city, and if a voter fails to register, he is not thereby exempt from the performance of labor upon the street. Section 1 of the ordinance reads:

4. Street labor,
not a tax on
right to vote.

“Each male resident of the city of Leavenworth between the ages of twenty-one and forty-five years is hereby required in his own proper person each year, upon notice from the street commissioner, his deputy, or an officer appointed for that purpose, to perform two days’ labor of ten hours each on the streets, alleys or avenues of said city, under the direction and control of the street commissioner or his deputies, or in lieu thereof to pay to the street commissioner the sum of one dollar and fifty cents for each day.”

Section 3 reads:

“After the duplicate list of persons registered has been delivered to the street commissioner, he shall, from time to time, as work may in his judgment, or upon the order of the city

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council, be required to be done, notify the persons upon said list, or so many thereof as may be necessary, to report to him at a time and place in said notice specified, which notice shall be either printed or written, or pay to him at said time and place the amount of money due for any delinquency in work, the same being for not less than one full day's labor."

Section 4 also reads :

"The street commissioner shall also notify all other persons specified in the first section of this ordinance whose names are not included in the list of registered persons, in the same manner as herein provided for persons registered, and such persons shall be subject to all of the provisions of this ordinance, and the names of such additional persons shall be by the street commissioner furnished to the city treasurer."

It is not shown that the petitioner is a cripple, or unable to perform the work required of him, and therefore the exemption of a disabled person is not before us for determination.

As the legislature has constituted each city of the first class a separate road district, and given such cities full control over
5. Road district ; later statute controls. the labor to be performed upon its streets, and authorized ordinances to be enacted to enforce the same, such statute is controlling, as it is a substitute for the prior statute, so far as it conflicts therewith. (Laws of 1881, ch. 37; *City of Salina v. Seitz*, 16 Kas. 143; *City of Macomb v. Twaddle*, 4 Bradw. 254; *Fox v. City*, 38 Ill. 452.)

The petitioner in the case must be remanded.

All the Justices concurring.

B. GRAY V. ELIZABETH I. CROCKETT, *et al.*

Motion for Rehearing.

ON April 15, 1886, the defendants in error filed a motion for a rehearing, which motion the court overruled at its session in November, 1886.

Nathan Cree, J. W. Green, and B. Gray, for plaintiff in error.

Barker, Gleed & Gleed, Stevens & Stevens, and John B. Scroggs, for defendants in error.

Per Curiam: We are satisfied with the law as declared by us in this case, *ante*, p. 66, and discover nothing to call for a rehearing.

The plaintiff is entitled to the enforcement of the contract made by him with H. C. Long. Mrs. Long is estopped from setting up her title to the land under the deeds from Long through Vedder to herself. Her contingent estate in the premises rests upon the ground that she is the wife of H. C. Long, and did not sign the written contract of April 22, 1881. If H. C. Long outlives his wife, there will be no contingent interest to contest. It is not necessary now to decide whether Mrs. Long or Mrs. Crockett is the holder of the contingent estate of Mrs. Long.

The motion for a rehearing will be overruled.

DAVID BANKS AND A. B. BANKS, *Partners as Banks Brothers*, v. A. S. EVEREST, B. P. WAGGENER AND FRANK EVEREST, *Partners as Everest & Waggener*.

1. **PRINCIPAL, When Bound by Acts of Agent.** A principal is bound for the acts of his agent done within the scope of his authority, and the principal will also be responsible for the unauthorized acts of the agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within and not in excess of the authority conferred on him.
2. **PRIVATE INSTRUCTIONS, When Inoperative.** Where an agent is held out to the world as one having the authority of a general agent, any private instructions or limitations not communicated to the persons dealing with such agent will not affect them nor relieve the principal from liability where the agent oversteps such limitations.

35	687
42	469
35	687
42	497
35	687
52	423
35	687
67	60
67	711
35	687
71	114

Banks Bros. v. Everest & Waggener.

Error from Atchison District Court.

EVEREST & WAGGENER, of Atchison, Kansas, brought an action in the district court of Atchison county, against *Banks Brothers*, to recover damages for the breach of an alleged contract. They allege that in 1883, *Banks Brothers*, through their duly-authorized agent, J. E. Frederick, sold and agreed to deliver the reports of the states of Vermont, New Hampshire, and Colorado, for the sum of \$600, the delivery to be made at Atchison, Kansas, free of any charges, and the price of the books to be paid within thirty days from the delivery thereof. They allege that the defendants have failed and refused to comply with the agreement, by which the plaintiffs have been damaged in the sum of \$300. The case was tried without a jury, at the June Term, 1884, and the court, at the request of the parties, stated its conclusions of fact and of law, which are as follows:

CONCLUSIONS OF FACT.

"1. The plaintiffs are partners, engaged in the practice of law at Atchison, Kansas, and they have been such partners so engaged for several years last past.

"2. The defendants are partners, engaged in the business of publishing, selling and dealing in law books, at Albany, in the state of New York, and they have been such partners so engaged in said business for several years last past, and they are assisted in their business by traveling salesmen, canvassers, or agents.

"3. On and prior to March 6, 1883, one J. Edward Frederick was a traveling agent in the employ of the defendants, and was duly authorized to represent them. It was intended by the defendants, however, that all sales made by J. Edward Frederick should be subject to the approval of the defendants before they should be binding upon the defendants, and said J. Edward Frederick so understood his authority. The plaintiffs did not know of such limitation of the authority of said J. Edward Frederick. They had frequently bought books from the defendants through such traveling agents or salesmen, after agreeing with such agents or salesmen upon the books and the price, and such books had always been furnished by the defendants at the price agreed upon between the plaintiffs and such traveling agents or salesmen, and the defendants

Statement of the Case.

never notified the plaintiffs, through the agents of the defendants nor otherwise, that the authority of their agents or salesmen was so limited, until after the controversy arose in this case.

"4. On March 6, 1883, said J. Edward Frederick called upon the plaintiffs at their office in Atchison, and asked them if they wanted to buy any law books from the defendants. After considerable negotiation, the plaintiffs agreed to purchase, and said J. Edward Frederick agreed on the part of the defendants to sell a set of New Hampshire reports, a set of Vermont reports, and a set of Colorado reports, for the sum of \$600, to be delivered in Atchison in the usual course of business, and to be paid for in thirty days thereafter. Some of the books were to be old and some new, but the old ones that needed rebinding were to be rebound so as to make them in good condition. Said agreement was wholly in parol, and nothing was said about the same being subject to the approval of the defendants, and the plaintiffs understood the agreement to be an absolute contract, and not subject to any condition other than as stated in this conclusion of fact.

"5. Said J. Edward Frederick immediately requested the defendants by letter to send said reports to the plaintiffs at said price, but the defendants refused, and have ever since refused, to forward said reports to the plaintiffs at said price, and they then denied, and have ever since denied, the validity of said agreement, on the ground that it was conditional only, and not complete or binding until after their approval, and that they never approved it.

"6. At the time and place at which such books should have been delivered, under the terms of said agreement, they were worth, in the condition that they should have been delivered, the sum of \$870.

"7. Said books have never been forwarded by the defendants to the plaintiffs, although the plaintiffs have ever been ready and willing to pay for the same in accordance with said agreement, and the plaintiffs often demanded performance of said agreement by the defendants before this action was commenced."

CONCLUSIONS OF LAW.

"1. The defendants were and are bound by the agreement made by the plaintiff with said agent of the defendants.

"2. The plaintiffs are entitled to recover from the defendants the sum of \$270, and costs of this suit."

Banks Bros. v. Everest & Waggener.

Judgment was rendered for the plaintiffs, for \$270 and costs. The defendants, *Banks Brothers*, bring the case here.

Porter & Hunter, and *Jackson & Royse*, for plaintiffs in error.

Everest & Waggener, defendants in error, for themselves.

The opinion of the court was delivered by

JOHNSTON, J.: The plaintiffs in error attack the findings of fact and conclusions of law made by the court below, but raise no other questions. The findings of fact are so far supported by the evidence that they must be accepted here as a correct narration of the actual facts in the case. The real inquiry in the case is, whether the conduct of the plaintiffs in error rendered them responsible as principals for the acts of their agent done in excess of the express authority given him.

The rule of law governing this case, as stated by a noted text writer, is that —

“A principal is responsible either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to his agent this authority.” (1 Pars. on Con. 44.)

Judge Story, in speaking of the liability of a principal for the unauthorized acts of his agent, where the apparent authority with which the agent is clothed is greater than was intended by the principal, says :

“In such cases good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself or another, shall himself suffer the injury, rather than the innocent party who has placed confidence in him.” (Story on Agency, § 127, and note.)

The same principle was recognized and applied by this

Opinion of the Court.

court in a case where an agreement was made by an agent and commercial traveler, and the principal contended that the agent exceeded his authority in making the agreement. It was said that—

“The defendants had no personal acquaintance, no negotiations, directly with the plaintiff. The entire trade was made between this agent and them. They had no knowledge of the extent or limitations of his authority. If the plaintiff accepted the contract of his agent, he must accept it as a whole, and cannot accept that which suits him and reject the balance. The principal is bound by the representations of his agent—bound by the contracts he makes within the apparent scope of his authority.” (*Babcock v. Deford*, 14 Kas. 408.)

Here we find that Frederick was the acknowledged agent of the plaintiffs in error, and “was duly authorized to represent them.” He and others of their agents had frequently sold law books to the defendants in error, fixing the terms of sale, and in each case the books had been furnished and forwarded at the price agreed upon between the agent and the defendants in error. It turns out that the extent of the agent’s authority was to solicit orders for his principals, which orders were subject to their approval or rejection. But although there had been a long course of dealing between the parties, this limitation had never been disclosed to the defendants in error, nor had it in any way come to their notice. Instead of revealing this limitation through their agents, by circular or otherwise, the plaintiffs in error allowed their agents to go out to the public and act in the character of general agents. When the orders were sent in, they could easily have notified their customers that the orders had been approved or rejected, and thus brought to the attention of their customers the extent of their agent’s authority; but this was not done. It also appears in the testimony that the agent from whom the books were purchased, in this case, brought a book to the office of the defendants in error at another time, which he sold and delivered to them, without communicating with or obtaining the approval of his principals. A bill for this book was forwarded by the plaintiffs in error, requesting payment from defendants in error,

Heatwole v. Gorrell.

which was the same procedure that was pursued in other cases where the books were furnished from the publishing house. Under these circumstances, we think the defendants in error had a right to believe that the agent was acting within and not exceeding the authority conferred on him when the sale in question was made. The defendants in error have dealt in good faith with the agent, upon the strength of his apparent authority, and ought not now to suffer. It is true, that in making the sale he violated the express authority given to him by the plaintiffs in error. But under the familiar principle that has been stated, where one of two innocent persons must suffer by the misconduct of an agent, it should be the one who, by his conduct, has enabled the agent to perpetrate the wrong.

The point urged that the principal cannot be held liable for the unauthorized act of his agent unless the persons dealing with the agent have sustained some loss, cannot apply, as the findings show that the defendants in error suffered a loss of \$270, and it was for that loss the present action was brought.

The judgment of the district court will be affirmed.

All the Justices concurring.

JOSEPH F. HEATWOLE V. THOMAS S. GORRELL, *et al.*

1. **CONTRACT; Sum Named, a Penalty.** Where H. sells his business and good-will to G., and as a part of the same transaction executes a written instrument in which he says: "I, —, bind myself in the sum of \$500" that I will not engage in such business at the same place for the period of five years, *held*, that the sum named in the instrument is a penalty, and not liquidated damages; and for a breach of the agreement by H., G. may recover only his actual damages.
2. **FIXED SUM, When a Penalty, and not Liquidated Damages.** Whenever a party *binds* himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to

35	002
47	130
35	002
49	500
35	002
51	557
35	002
50	151
35	002
71	036
35	002
80	700

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the magnitude or the number of any breaches that may occur, or the amount of the damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages.

Error from Crawford District Court.

ACTION brought by *Gorrell & Mosteller* against *Heatwole*, to recover damages for the breach of a certain written contract Trial at the January Term, 1885, and judgment for plaintiffs for \$500 and costs. The defendant brings the case here. The opinion states the facts.

John Martin, for plaintiff in error.

John T. Voss, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Crawford county, by Thomas S. Gorrell and Louis M. Mosteller, partners as Gorrell & Mosteller, against Joseph F. Heatwole, to recover \$500 for an alleged breach of the following instrument in writing, to wit:

"PITTSBURG, KANSAS, Feb'y 26, 1883.—I, Joseph F. Heatwole, of the city of Pittsburg and county of Crawford and state of Kansas, bind myself in the sum of five hundred dollars to Thomas S. Gorrell, Louis M. Mosteller, and James J. Avery, in the county and state above mentioned, that I will not engage in the business myself or allow my name to be used in company with anyone, in dealing in hardware and implements in the said Baker township, Crawford county, Kansas, for the period of five years from this date. If this agreement is performed on my part in good faith, this agreement to be null and void; otherwise to remain in full force.

"Witness my hand this 26th day of February, 1883.

(Signed) JOSEPH F. HEATWOLE."

The case was tried before the court and a jury, and the jury found a general verdict in favor of the plaintiffs and against the defendant for \$500, and the court rendered judgment accordingly. The defendant brings the case to this court for review.

Heatwole v. Gorrell.

Several questions were raised in the court below, but the only question which needs to be considered in this court is, whether the sum of \$500, mentioned in the foregoing instrument in writing, is a penalty or is liquidated damages. The plaintiff in error, defendant below, claims that it is a penalty, while the defendants in error, plaintiffs below, claim that it is liquidated damages. The court below did not directly decide the question, but submitted the same to the jury for their determination, and the jury found generally in favor of the plaintiffs below and against the defendant below, and therefore in effect found that the above-mentioned sum was liquidated damages, and not a penalty; and the court below sustained the verdict.

The foregoing instrument in writing was executed under the following circumstances: On February 26, 1883, the defendant, Heatwole, was engaged in business in Pittsburg, Baker township, Crawford county, Kansas, as a retail dealer in hardware. He desired to sell his business, including his stock in trade, and the plaintiffs desired to purchase the same, but upon the condition only that the defendant should enter into a penal bond in the sum of \$500 that he would not again go into the hardware business at that place for five years. The plaintiff Gorrell testified on the trial, among other things, as follows:

"When Mosteller and myself first spoke to Heatwole about purchasing his stock of hardware, he agreed to execute to us a bond in the penal sum of five hundred dollars. . . .

"When I spoke to Mr. Heatwole about buying his stock of hardware, I told him I didn't want to buy it and he to stay in the business. He promised us he would go into a written bond in the penal sum of five hundred dollars he would not go into the business.

"Q. State whether or not that was part of the inducement?

A. That was part of the inducement.

"Q. State whether or not you would have made this purchase if it had not been for the giving of the bond? A. No, sir; I don't think I would."

The purchase was made and the bond was given on February 26, 1883. Afterward, and about the last of September, 1884,

Opinion of the Court.

the defendant Heatwole again went into the hardware business at Pittsburg, Kansas; and on December 3, 1884, this action was commenced.

Was the foregoing instrument in writing correctly interpreted in the court below? We think not. Of course, in all cases of this kind the will and intention of the parties must govern; but from the language of the instrument in this case, and the circumstances under which it was executed,

1. Contract; sum named, a penalty.

it cannot be supposed that the parties intended that the sum of \$500 should be considered as liquidated damages, and not as a penalty. There was no expressed agreement that the defendant Heatwole should pay liquidated damages, or damages of any kind, or that he should pay anything; and evidently, if the parties believed each other to be honest, and each intended that the contract should be fulfilled, it was not expected or intended that the defendant should ever *pay* anything. The essence of the contract was, that the plaintiffs should purchase the defendant's business and his good-will for five years, and that he should not again for that period of time and at that place enter into that kind of business, and that during that period of time he should stand *bound* in the *penal* sum of \$500, as a security for the performance of the contract on his part. This instrument was in terms a bond. The defendant in express terms says in the instrument: "I, —, *bind* myself in the sum of \$500," etc., and a bond of this character is always *prima facie* a *penal* obligation. (1 Suth. on Damages, 489.) And there is nothing in all this case tending to show that the present bond is not a penal obligation. But if it were doubtful whether this bond should be construed to be a penal obligation or a contract to pay liquidated damages, then the courts should and would construe it to be a penal obligation; for in that case exact justice could be done between the parties by giving to the aggrieved parties their exact damages—neither more nor less; while, on the other hand, if the instrument were held to be a contract to pay liquidated damages, great injustice might be done by compelling the party who executed the

Heatwole v Gorrell.

instrument to pay to the other parties vastly more than their actual damages. In the present case the sum of \$500, as fixed by the parties, was intended to cover every breach and all breaches for the entire period of five years, and it was to prevent the defendant from engaging in the business of dealing in any hardware or dealing in any implements, or allowing his name to be used in dealing in any hardware or in dealing in any implements, not only for the period of one day, or one week, or one month, or one year, but for the entire period of five years; and the said sum of \$500 was considered as an ample and sufficient compensation, not only for a single breach of the contract for a single day in dealing in the smallest quantity of hardware or the smallest number of implements, but was considered as a sufficient compensation for all possible breaches or for an entire breach of the entire contract for the entire period of five years, and without reference to the amount of the stock of hardware or the amount of the stock of implements which the defendant might keep if he committed any breach. And where an absolute sum is fixed in a contract as a security against all breach or breaches of the contract, without reference to the magnitude of the breaches or the number thereof, and without reference to the amount of the actual damages which might ensue from such breach or breaches, whether great or small, and this where there might be several breaches, and each of a greater or less magnitude, and each followed by greater or less damages, such fixed sum cannot be considered as agreed or liquidated damages, but must be considered as a penalty. It is simply a penalty intended to cover every breach and all breaches; and to be recovered in proportion to the actual damages which may result from any breach or breaches, and is not liquidated damages, to be recovered in full for the slightest or most trivial or insignificant breach of the contract; and where there may be a doubt as to whether the sum fixed is a penalty or is liquidated damages, the courts will construe it to be a penalty.

2. Fixed sum, when a penalty, and not liquidated damages.

Mr. Pomeroy, in his work on Equity Jurisprudence, uses the following language:

“Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect, that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages.” (1 Pomeroy’s Eq. Jur., § 444.)

The following cases we think support this doctrine: *Davies v. Penton*, 6 Barn. & Cres. (Eng.), 216; *Horner v. Flintoff*, 9 Mees. & Wels. (Eng.), 678; *Perkins v. Lyman*, 11 Mass. 76; *Ex parte Pollard*, 2 Lowell’s Dec. 411; same case, 17 Nat. Bank Reg. 229; *Whitfield v. Levy*, 35 N. J. L. 149. See also, as tending to support the foregoing doctrine, the following: *Hamaker v. Schroers*, 49 Mo. 406; *S. & C. Rld. Co. v. Calahan*, 56 Ga. 331; *Jemison v. Gray*, 29 Iowa, 537; *Dullaghan v. Fitch*, 42 Wis. 679; *Lyman v. Babcock*, 40 id. 504; *Taylor v. Mercella*, 1 Woods, (U. S. C. C.,) 302; *Cury v. Larer*, 7 Pa. St. 470; *Shreve v. Brereton*, 51 id. 175; *Lampman v. Cochran*, 16 N. Y. 275; *Niver v. Rossman*, 18 Barb. 50; *Beale v. Hayes*, 5 Sandf. 640.

There are a few cases which seem to assert a contrary doctrine: *Streeter v. Rush*, 25 Cal. 67; *Cushing v. Drew*, 97 Mass. 445; *Grasselli v. Lowden*, 11 Ohio St. 349. In the California case, there is an able dissenting opinion by Mr. Justice Sawyer. In the Massachusetts case, the material words are, “do agree to pay,” while in the present case the material word is “bind.” In the Ohio case, the material words are that the party obligating himself “agrees for himself and representatives to pay to the said John Lowden [the other party], or his representatives, the sum of \$3,000 as liquidated damages.” The Ohio decision is probably correct, and possibly also the Massachusetts decision, and yet we are not entirely satisfied with that decision; nor are we satisfied with the California

Heatwole v. Gorrell.

decision; and so far as any of these decisions differ from the views we have herein expressed we cannot agree with them.

It would be an injustice in this case to require the defendant to pay the full sum of \$500 for the breach of his obligation for only about two months. That sum was intended as a full compensation for every breach and all breaches which he could possibly commit during the entire period of five years. The defendant fulfilled his obligation for about nineteen months, and then violated the same for only a little more than two months, when this action was commenced; and shall he pay the entire sum of \$500 for a two-months breach, when that sum was considered and intended as a sufficient compensation for a five-years breach? Of course if the sum of \$500 is to be considered as liquidated damages, and not as a penalty, then the plaintiffs would be entitled to recover the entire amount, although the breach might not have continued more than one day, and this day might be the last day of the five years as well as the first or any intermediate day; and the breach might be only a slight and technical breach—the inadvertent dealing as a clerk or otherwise in a small quantity of hardware or a few implements. Such a result would be grossly unjust. If, however, we should consider the said sum as only a penalty, then the defendant would be required to pay only a fair compensation in damages for the breach of his obligation; and a fair compensation is all that the plaintiffs are in justice entitled to claim. It is the injustice that must necessarily ensue in many cases, from construing fixed sums in contracts to be liquidated damages, rather than penalties, that has caused courts to generally construe such sums to be only penalties; and courts will always construe such sums to be penalties unless it is clear that it was the intention of the parties that such sums should not be considered as penalties, but as liquidated damages. Such does not appear to have been the intention of the parties in this case. Everything in the present case tends to show that said sum of \$500 was intended as a penalty, and not as liquidated damages. About

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the only ground upon which it is claimed that the sum mentioned in the present contract should be considered as liquidated damages, and not as a penalty, is the claim that for a breach of the contract the damages would be uncertain and would be difficult of proof. Now the damages in this case are not more uncertain than the damages are in many other kinds of cases where the law unquestionably gives damages, and not more difficult of proof than they are in many of such cases. Take, for instance, the action of slander, or an action for a breach of promise to marry, or an action for a breach of warranty concerning property where the purchaser retains the property, or many other cases which may be imagined. In the present case, proof could be introduced concerning the length of time during which the defendant had been in business in violation of his contract, the amount of his stock, the number and amount of his sales, who were his customers, the loss of the plaintiffs' sales, etc.; and from such facts and others the jury might determine with a sufficient degree of accuracy the amount of the damages.

It is our opinion, from the authorities and from reason, that whenever a party *binds* himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that may occur, or the amount of the damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

35	700
37	108
37	577
38	599
35	700
45	509
46	515
35	700
58	772
35	700
79	425

THE UNION PACIFIC RAILWAY COMPANY V. WILLIAM FRAY.

1. **RAILROAD EMPLOYÉ—Two Duties Imposed; Question of Fact.** Where a duty is imposed by a railroad company upon one of its employés, and afterward another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty, is a question of fact to be submitted to the jury upon the evidence, and is not a question of law.
2. **CONVERSATION; Incompetent Evidence.** A conversation between two employés of a railroad company concerning a past transaction, is incompetent evidence as against the railroad company to prove such transaction.
3. ——— **Erroneous Instruction.** In an action brought by an employé against a railroad company for injuries resulting from alleged negligence, evidence was introduced tending to show that a duty was imposed by the railroad company upon such employé, and afterward another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time, and evidence was also introduced tending to show that he might have performed both duties by attending to one and then to the other alternately, and that he failed in the performance of one of such duties, and that by reason of such failure the injury for which he sued the railroad company resulted. *Held*, That an instruction by the court to the jury in substance that, if at the time of the injury the plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous.
4. ——— **Erroneous Instruction.** Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that "in case no evidence can be found bearing upon the question required to be answered, the jury will say 'Don't know,' or 'Cannot answer from the evidence.'"
5. **QUESTIONS, Not Answered; Error.** And in such a case, where the jury answer eight of such questions by simply saying "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held*, error.

Error from Wyandotte District Court.

AT the July Term, 1884, plaintiff *Fray* recovered against the defendant *Railway Company* a judgment for \$4,000, damages for personal injuries. The defendant brings the case to this court. The material facts are stated in the opinion, and in *U. P. Rly. Co. v. Fray*, 31 Kas. 739, *et seq.*

J. P. Usher, for plaintiff in error.

R. B. Clark, and *Nathan Cree*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This case has once before been in this court. (*U. P. Rly. Co. v. Fray*, 31 Kas. 739; same case, 15 Am. & Eng. Rld. Cases, 158.) After the former decision, the case was returned to the district court, where it was again tried before the court and a jury, and the jury found a general verdict in favor of Fray, who was the plaintiff below, and against the railroad company, which was the defendant below, and assessed the damages at \$4,000, and also made several special findings of fact; and upon this general verdict and these special findings of fact the district court rendered judgment in favor of Fray and against the railroad company for the amount of the general verdict and costs, and the railroad company, as plaintiff in error, again brings the case to this court and again seeks a reversal of the judgment of the court below.

The evidence introduced on the second trial is very similar to that introduced on the first trial. There are some differences, however, which we may mention as we proceed with this opinion.

The foundation of the plaintiff's action is the alleged negligence of the defendant railroad company in failing to provide and maintain a safe and sufficient derrick, with sufficient ropes and other appliances, for the safe handling of stone in building a culvert for the defendant on its line of railroad in Wyandotte county, Kansas, at a point known as "Deep Hollow

U. P. Rly. Co. v. Fray.

Bridge," near a station on the line of the company's railroad, called "Tiblow." Samuel Mallison was the railroad company's general superintendent in building the culvert, William Ulrich was the overseer or foreman of the work under Mallison, and John Nelson and the plaintiff Fray were laborers, handling the derrick and performing such other duties as might be assigned to them by either Mallison or Ulrich. This derrick was used in removing stone from a platform near the derrick to a place about forty feet below, where the stone was used in constructing the culvert. In operating this derrick, a rope, usually called a brake-rope, was used, a portion of which was wound around a pinion-shaft. This pinion-shaft, from friction produced in some manner not shown by the record, would become heated whenever it was used unless water at such times was constantly poured upon it, and when allowed to become heated it would burn or char the brake-rope so as to render it frail, weak, and unsafe. If, however, water was poured upon the brake-rope and pinion-shaft while the derrick was being operated, and if occasionally, when the brake-rope became worn, a new one was put in its place, there was no danger in operating the derrick. In the present case there seems to have been negligence in not keeping the brake-rope and pinion-shaft wet, and in allowing the brake-rope to become burnt or charred, and partially worn before removal, so as to render it unsafe, whereby it broke and caused portions of the derrick to break, and thereby caused the injuries of which the plaintiff complains, and for which he seeks damages in this action.

It seems to be admitted by both parties that there was negligence in this respect, but the parties differ as to who was guilty of the negligence. The plaintiff claims that it was principally, if not entirely, the negligence of Ulrich, while the defendant claims that it was wholly the negligence of Fray and Nelson, and principally the negligence of Fray himself. In all probability Ulrich, Fray and Nelson were about equally guilty of the negligence that caused the injuries complained of. The plaintiff claims that the defendant is liable for the

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negligence of Nelson as well as of Ulrich, as Nelson was one of the defendants' servants; but the defendant claims that the plaintiff is liable for the negligence of Nelson for the following reasons: The railroad company claims that the duty of keeping the brake-rope and pinion-shaft wet, and of seeing that the brake-rope was at all times safe and in proper condition, was imposed particularly upon the plaintiff and Nelson jointly and severally; that they worked together at and near the derrick, and that it was their duty, jointly as well as severally, to watch the derrick, the brake-rope and the pinion-shaft, and to see that at all times the brake-rope was safe and in good condition. On the second trial an effort was made by the plaintiff to show that the brake-rope became unsafe from wear alone, and that it did not burn or char, but we think the effort was a failure. There was also an effort made on the part of the plaintiff to show that although the duty of keeping the brake-rope and pinion-shaft wet was at one time imposed upon the plaintiff, or the plaintiff and Nelson, by Mallison or Ulrich, or both, yet that the plaintiff was afterward relieved from such duty and assigned to another by Ulrich. Whether this was so, or not, is probably one of the principal questions, if not the main question, in the case; and this question under the evidence is one of fact, and not one of law. On the part of the defendant, an attempt was made to show that the duty of keeping the brake-rope and pinion-shaft wet was imposed upon Fray and Nelson by Mallison, and that Ulrich not only did not attempt to relieve them from such duty, but that he had no power to do so if he had so attempted. As Ulrich, however, was the foreman of the work, and as Fray and Nelson worked under him, we would think that the attempt to show that Fray and Nelson had the right to work independently of him or to violate his orders was a failure. As between Fray and the railroad company, we would think from the evidence that Ulrich had the power to assign Fray and Nelson to other and different duties, and to relieve them from the duty of keeping the brake-rope and

1. Railroad employe, two duties imposed; question of fact.

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pinion-shaft wet. The only question then, in this regard is, whether he did in fact relieve Fray from the duty of keeping the brake-rope and pinion-shaft wet. He did not expressly so relieve him, but whether he did so impliedly is the question to be considered. This, as before stated, we think is the main question involved in the case, and under the evidence is purely a question of fact and not one of law, and therefore we do not think that we can decide it as a question of law. Really the only question which we can determine is, whether this question and the other questions of fact involved in the case were fairly submitted to the jury and fairly tried by them. The defendant claims that they were not. It claims that improper evidence was admitted; that improper instructions were given; that proper instructions were refused; that the jury refused to answer proper questions of fact which had previously been submitted to them, and that the court below refused to require the jury to answer such questions. Whether the foregoing errors were in fact committed or not, we shall now proceed to consider.

The first claim of error is, that the district court erred in permitting testimony of a conversation had on the next day after the accident, between John Nelson and Samuel Mallison, to be introduced in evidence. This conversation was concerning matters which occurred on the day of the accident, and which tended to prove negligence on the part of Ulrich. It was concerning past events, and although it occurred between persons in the employment of the defendant, Conversation; incompetent evidence. still it was pure and simple hearsay testimony, and not admissible under any rule of law. The authorities cited by the defendant in error are not applicable. It is possible, however, under the other facts and circumstances of the case, that this error is immaterial; but whether it is or not we need not now determine.

It is next claimed that the court below erred in refusing to give certain instructions and in giving certain other instructions. We think the court below did so err. We shall now assume that Ulrich and Nelson were guilty of negligence for

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which the railway company is responsible, and that their negligence was so clearly and conclusively shown by the evidence that any errors of the court with respect thereto are wholly immaterial. But still, the principal question presented to the court below was, whether the plaintiff was guilty of contributory negligence or not, which question was one of fact for the jury; and the principal question now to be determined by this court is, whether that question was fairly submitted to the jury or not, for their determination. We hardly think it was. From the evidence introduced, the duty of keeping the brake-rope wet was at one time imposed upon the plaintiff, among others; and also from the evidence it is probable that if the brake-rope had been kept wet it would not have broken as it did, and the accident would not have occurred. It is also in evidence that the further duty of giving and receiving signals was also imposed upon the plaintiff, and in giving and receiving such signals it was necessary for the plaintiff to stand on the edge of the platform, a few feet from the derrick, but so far away from the derrick that he could not while there pour water on the brake-rope. Neither could he give nor receive signals while pouring water on the brake-rope. In other words, he could not perform both duties at the same time. This we think has at all times been conceded by the parties, and at no time has any question with reference thereto been raised by either party. This accident occurred while the plaintiff was on the edge of the platform for the purpose of giving and receiving signals.

But although the defendant concedes that both duties could not have been performed precisely at the same time, yet it claims that the plaintiff could have easily performed both duties by first attending to one, and then to the other, alternately; that is, he could have first wet the brake-rope, and then attended to the other duty, and then wet the brake-rope again, and so on, without any difficulty. The defendant claims that even after the employes had commenced to move a stone for the purpose of letting it down to the place where it was to be put in the culvert, the plaintiff could have stepped to the

U. P. Rly. Co. v. Fray.

derrick and poured water on the brake-rope, and then have stepped back to the edge of the platform, to receive and give signals; that the performance of one of these duties would not at all have interfered with the performance of the other; and considerable evidence to this effect was introduced on the trial; but it does not appear that the court below charged the jury sufficiently with respect to this aspect of the case. The court refused all the instructions asked for by the defendant upon this subject, and indeed upon every other subject, and gave only its own instructions. Among these instructions given are the following:

"20. . . . But if the jury further find and believe from the evidence that after said order [to keep the brake-rope wet] was given by said Mallison to said plaintiff, that one Ulrich became foreman, with authority to superintend and direct work for defendant, and that said Ulrich had assigned other duties to the plaintiff, and at the time of the alleged injury occasioned by the breaking of the said brake-rope, and prior to and at the time of said alleged injury, the plaintiff, in obedience to orders of Ulrich, was in the discharge of other duties than wetting said rope, he was bound to discharge such other duties, (if the jury find he was assigned to other duties); and if it appears the plaintiff received the alleged injuries in the discharge of such other duties under the direction of the foreman, then the defendant would properly be charged with negligence."

"24. If the jury believe from the evidence that Samuel Mallison was superintendent of the work, and William Ulrich was overseer or foreman of the work, and that John Nelson and the plaintiff were laborers handling the derrick when the accident occurred, and if the jury further find and believe that William Ulrich, overseer, prior to the time of said accident, assigned and directed plaintiff the work and duty of giving signals to other workmen while lowering rock from the derrick platform into the pit below, and if the jury further find that at the time the accident occurred the plaintiff, in obedience to previous directions given by the overseer, was at his proper place ready and waiting to give the required signals, or in the act of giving such signals, then plaintiff was in the line of his duty under the orders of the overseer of the work at the time of the accident."

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"28. If the jury find and believe from the evidence that plaintiff was charged by both Mallison and Ulrich with keeping the brake-rope wet while lowering rocks, and also charged by Ulrich to give signals to the workmen in lowering the rocks, and if the jury further find and believe that neither of these orders was revoked when the accident happened, then the jury will consider whether the plaintiff at the time of the accident was occupied in giving signals or pouring water on the rope, and they will further find and consider whether he could perform both duties at the same time. And if the jury find that both duties could not be performed at one and the same time, and if they believe that both could not be performed at the same time, then the jury will find from the evidence to which of these duties he was assigned at and immediately prior to the accident that caused the injury, and if the jury find and believe that at that time he was assigned to and directed to pour water on the rope, and the rope broke, and he was injured on account of his failure to keep the rope wet, then and in that case the plaintiff is not entitled to recover; *but if the jury find and believe that at the time of the accident the plaintiff was engaged in giving signals or other duties pertaining to the giving of such signals, and in the line of his duty pertaining to such orders, then he could not be charged with negligence in failing to pour water on the brake-rope in lowering the rock.*"

Now these instructions are in substance that if the plaintiff had two duties to perform, one in pouring water on the brake-rope at the derrick and the other in giving signals at the edge of the platform, and if he could not perform both of these duties at the same time—and he certainly could not—and if at the time of the accident he was properly at the edge of the platform for the purpose of giving signals—and probably he was properly at that place at that time—then that he performed his whole duty, and he could not be charged with negligence, although he may have had ample time to have poured water on the brake-rope immediately before he took his position on the edge of the platform. In other words, that if he was performing his duty at the edge of the platform at the very time of the accident—and perhaps the defendant will admit that he was—then that his prior negligence immediately preceding the accident in not

3. Erroneous instruction.

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pouring water on the brake-rope, if he was guilty of such negligence, could not affect his right to recover. This cannot be the law. If the rope broke because of his negligence in not pouring water on it a few moments before the accident occurred, it could not make any difference that he was properly performing another duty at the precise time of the accident. If it was the duty of the plaintiff to pour water on the brake-rope prior to his taking position on the edge of the platform, and if the rope broke because he failed to perform this duty, then he cannot recover. The foregoing instructions probably misled the jury.

It is also claimed that the court below erred in giving the following instruction to the jury with regard to the special questions of fact submitted to them for their answers, to wit: "In case no evidence can be found bearing upon the question required to be answered, the jury will say: 'Don't know,' or 'Cannot answer from the evidence.'"

4. Erroneous instruction. We think the court below erred as is claimed. (*K. P. Rly. v. Peavey*, 34 Kas. 474, 486.)

It is also claimed that the court below erred in refusing to require the jury to answer in an intelligent manner the following special questions submitted to them at the request of the defendant. The following are the questions, with the answers of the jury:

"*Ques. 2:* Was the plaintiff instructed by Mallison, acting for the defendant, that there was danger of the brake-rope burning, in letting the rock down into place, if the rope was not kept wet? *Ans.:* Don't know."

"*Q. 5.* If the brake-rope had been kept wet where it wound around the shaft, and the friction occurred, would it have burned? *A.* Don't know."

"*Q. 6.* Did the plaintiff observe and obey the directions of Samuel Mallison in respect to keeping the rope wet? *A.* Don't know."

"*Q. 7.* Was not the plaintiff repeatedly warned by Samuel Mallison and William Ulrich, the foreman upon the work, to be careful to attend and see that the brake-rope was kept wet while rock was being lowered by the derrick to the work below? *A.* Don't know."

Hinnen v. Newman.

"Q. 9. Would the brake-rope have burned if it had been kept wet as directed by Mallison? A. Don't know.

"Q. 10. Did anyone for the defendant direct the plaintiff not to observe the directions given him by Mallison in respect to keeping the rope wet? If so, name the person, and state what was said. A. Don't know.

"Q. 11. Was not the plaintiff provided with a bucket for the water which he was to use in wetting the brake-rope, and a proper vessel for applying water to the rope? and was not water flowing near by, which the plaintiff could get to wet the rope? A. Don't know, as to the first paragraph; yes, as to the second.

"Q. 12. Was not the brake-rope put on new the day of the accident or the day before, and was it not of size and strength sufficient for the purpose of controlling the lowering of the rock by the derrick, and was not the only thing needed to make it safe to keep it wet as directed by Mallison? A. Don't know."

We think the court below erred in refusing to require the jury to answer these questions in a proper manner. The questions are material, and there was some evidence introduced applicable to every one of them.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

GOTTLIEB HINNEN V. SAMUEL NEWMAN.

1. ACTION, *Founded upon Illegal Transaction.* As a general rule, an action which grows out of and is founded upon an illegal transaction, where the plaintiff and defendant are in equal guilt, cannot be maintained.

2. FRAUD; *Parties Equally Culpable; No Cause of Action.* N. was employed by the executors of an estate to sell the property of the estate at public auction, and he entered into a secret agreement with H. to attend the sale and purchase certain horses belonging to the estate for him. In pursuance of the agreement, H. appeared at the sale, and without any notice to those interested in the estate, or to the bystanders, he bid in the horses for N., but in his own name, and paid for them with his own funds. Afterward, the horses came into the

35	709
35	151
35	709
48	598
49	649
35	709
52	146
25	709
58	717
35	709
69	290

Hinnen v. Newman.

possession of N.; and H., claiming the ownership, brings an action of replevin to recover the possession of them. *Held*, That the conduct of the parties in the purchase and sale of the horses, contravenes public policy and is illegal, and that as the plaintiff's right of action is founded solely on the illegal transaction, and as he is equally culpable with the defendant, he must fail.

Error from Jackson District Court.

ACTION by *Gottlieb Hinnen* to recover from *Samuel Newman* the possession of two horses alleged to be the property of the plaintiff, and to be unlawfully detained by the defendant. A trial was had at the November Term, 1884, without a jury, when the following findings of fact and law were made by the court:

FINDINGS OF FACT.

"1. On and before the 5th day of September, 1884, the property in controversy in this action was then the property of the estate of Samuel Horner, deceased.

"2. The defendant was employed by the executors of said Samuel Horner as auctioneer to sell said property, and, as such auctioneer, sold said property, on the 5th day of September, 1884.

"3. Prior to said public sale, the plaintiff entered into a secret agreement with the defendant to appear at said sale and bid in the property for him, the defendant.

"4. Plaintiff did appear at said sale, and did, as aforesaid, bid in said horses in controversy in his own name, but for the defendant; and he (plaintiff) paid to the executors of said last will and testament the amount of said bids.

"5. No notice was given to said executors, or to anyone interested in said estate, or to the bystanders, or to any other person, of the fact that defendant had requested the plaintiff to bid said property in for him, the defendant.

"6. In bidding in said property the plaintiff bid the same in in his own name; and the property was stricken off to him personally by the defendant, and was then and there delivered to him, said plaintiff, for the defendant, the defendant at the same time declaring that the property was sold to Gottlieb Hinnen.

"7. The plaintiff paid to the executors with his own funds the several amounts for which said horses were respectively

Statement of the Case.

sold to him, and defendant has paid nothing for either of said horses.

"8. Before the commencement of this suit the plaintiff demanded of the defendant the delivery of the horses in controversy in this action to him, the plaintiff, which defendant refused to do; and defendant ever since that time, and up to the commencement of this action, has refused, and still refuses, to return the property in controversy to the plaintiff.

"9. The horse first described in the petition, to wit, one sorrel horse with white strip in forehead, about fifteen hands high, was, at the date of sale and at the commencement of this action, of the value of \$60; and the other horse in said petition described was, at the date of said sale and at the commencement of this action, of the actual value of \$20.

"10. The use of said horses since the 5th day of September, 1884, is worth \$25.

"11. The executors of the estate of Samuel Horner, deceased, have made no objections to said sale so made to the plaintiff, and have never asked to have the same rescinded.

"12. The defendant, on the day succeeding the day of said sale, to wit, the 6th day of September, 1884, tendered payment to said plaintiff of the amount for which said property in controversy was sold.

"13. The terms of said sale were nine months' credit without interest, the purchaser giving note with approved security."

CONCLUSIONS OF LAW.

"1. The secret agreement made by plaintiff with defendant, whereby plaintiff was to act as agent for defendant in bidding off said horses for the benefit of defendant, was fraudulent and void, as against public policy.

"2. By reason of said agreement so made between plaintiff and defendant, being fraudulent and void, as against public policy, the defendant is entitled to a judgment for his costs herein."

In accordance with the foregoing findings of fact and conclusions of law, the court rendered judgment for costs in favor of the defendant. The plaintiff brings the case to this court.

Hayden & Hayden, for plaintiff in error.

Lowell & Walker, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: The foundation of the plaintiff's action is a pretended sale to him of the horses in controversy, at a public auction. The defendant, Samuel Newman, was employed by the executors of the estate of Samuel Horner, deceased, as an auctioneer to sell the property of the estate. Before the day set for the public auction, the plaintiff entered into a secret agreement with the defendant to attend the sale, and there purchase the horses in question for the defendant. In pursuance of the agreement the plaintiff attended the sale, and without any notice to those interested in the estate, or to the bystanders, of his purpose, he bid in the property for the auctioneer, but in his own name. The horses having come into the possession of the defendant, the plaintiff now asks the court to assist him in reclaiming them.

The whole transaction between these parties contravenes public policy and is clearly illegal, and the general rule is that an action founded upon an illegal transaction, where the parties are *in pari delicto*, cannot be maintained. In all such cases the courts refuse to assist the parties to carry out or to reap the fruits of the illegal transaction, but will leave them in the condition in which they were found. In applying this principle, the supreme court of the United States has said:

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practiced fraud, which, when detected, deprives him of anticipated profits, and subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by the exertion of its powers by shifting the loss from the one to the other, or equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws." (*Bartle v. Coleman*, 4 Pet. 184.)

Here, both of the parties before the court were directly concerned in the transaction. Together they secretly conspired to and did commit a wrong against others. The transaction tainted with illegality was voluntarily entered into and consum-

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mated by them. There was no constraint upon the plaintiff compelling him to carry out the unlawful purpose, nor does any fact appear which affords him any excuse for his misconduct, or that would bring him within any of the exceptions to the rule that has been stated. He concedes that the transaction was illegal, but to escape the penalty which the law justly imposes upon a guilty participant, he says that the property was bid in in his own name, and paid for with his own funds, and he claims that his right of action is based on these facts rather than on the illegal transaction, and that he can make out his cause of action without the aid of that transaction. It is claimed that the true test for determining his right of recovery is by considering whether he can establish his case without the necessity of having recourse to the illegal transaction, and if so, he must prevail. This test is applied for the only purpose of determining whether the parties before the court are *in pari delicto*, in which case they are remediless. (Broom's Legal Maxims, 645; *Holt v. Green*, 73 Pa. St. 198; Wait's Actions and Defenses, 64.) There is little necessity or room for the application of this test where the plaintiff and defendant are so obviously in equal fault as we have seen the parties are in this case. But if the test proposed is applicable, it will not avail the plaintiff. The only interest or right of possession which he has in the property is derived from the sale, which is confessedly illegal. To establish his case, he must show that he purchased the property at that sale, and he thereby brings the illegal transaction into the case. Both parties claim under that sale—the plaintiff because he bid in the property in his own name, and the defendant because it was bid in for him and not for the plaintiff. Neither of them can come into court with clean hands and ask anything under the fraudulent and illegal transaction. If the possession of the property was changed and the defendant were in court seeking to obtain possession of it, he would be refused assistance, although from the findings it appears that the property was purchased solely for him. He is in no better position

The State, *ex rel.*, v. Brayman.

than the plaintiff, and would be entitled to no greater consideration. It has been said that—

“The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but is founded on general principles of policy which the defendant has the advantage of, contrary to the rule of justice as between him and the plaintiff—by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*.” (*Holman v. Johnson*, 1 Cowp. 343.)

As the plaintiff's right of action grows out of and rests solely upon the illegal transaction, and as he is equally culpable with the defendant, he must fail. The judgment of the district court is right and just, and will be affirmed.

All the Justices concurring.

36 714
37 740
37 741

35 714
62 104

THE STATE OF KANSAS, *ex rel.* W. A. Doolittle, County Attorney of Wabaunsee County, v. D. R. BRAYMAN.

1. JUSTICE OF THE PEACE; *Limit of Jurisdiction*. The jurisdiction of a justice of the peace is limited in civil actions to the county in which he resides, and for which he has been elected; and where an action is brought before him and service obtained upon one defendant, he has no authority to issue a summons in such action to an officer of another county, there to be served upon another defendant.
2. ——— *Summons to Another County*. The provisions of the civil code authorizing the issuance of a summons to a county other than the one in which the action is brought, are not applicable to proceedings before a justice of the peace.

Error from Wabaunsee District Court.

THE opinion states the nature of the action, and the facts. Judgment for the defendant *Brayman*, at the March Term, 1886. *The State* brings the case here.

A. H. Case, for plaintiff in error.

Geo. G. Cornell, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This was a proceeding in mandamus, brought by the state, upon the relation of the county attorney of Wabaunsee county, to compel D. R. Brayman, a justice of the peace of that county, to issue a summons in an action instituted before him, to a defendant who resided in Shawnee county. The summons was asked for in an action in which J. F. Limerick & Co. were plaintiffs, and A. W. Miles and Tom E. Guest were defendants, to recover upon a promissory note which A. W. Miles had made and delivered to the Burlington Insurance Company, and which had been indorsed by that company to Tom E. Guest, who had in turn transferred the same to J. F. Limerick & Co. Tom E. Guest was a resident of Wabaunsee county, but A. W. Miles was a *bona fide* resident of Shawnee county. The defendant refused to issue the summons to the sheriff of Shawnee county, claiming that he had no jurisdiction, as a justice of the peace of Wabaunsee county, over a defendant residing outside of such county, and had no authority to issue the summons to any officer of Shawnee county. The district court held that the justice of the peace could not be compelled to issue the summons, and refused a peremptory writ, and the plaintiff seeks here a reversal of that ruling.

The only question presented by the record is, where a right of action exists against two persons living in different counties, and an action is brought before a justice of the peace where one of them resides, and service obtained upon him, whether the justice of the peace can issue a summons to an officer of

The State, *ex rel.*, v. Brayman.

another county, and obtain jurisdiction of the defendant residing outside of the county where his court is held. It is not claimed that authority for such a practice is expressly given by the code regulating procedure before justices of the peace. The claim is that the provisions of § 60 of the code of civil procedure, with respect to summoning a co-defendant living outside of the county where the action is brought, is made applicable by the following provision of the justices code:

“The provisions of the act entitled ‘An act to establish a code of civil procedure,’ which are in their nature applicable to the jurisdiction and proceeding before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace.” (Comp. Laws of 1879, ch. 81, § 185.)

This section cannot have the effect claimed; because provisions respecting the commencement of an action and the issuance of summons have been made in the justices code, and these do not harmonize with the provisions in the civil code sought to be applied. In art. 2 of the justices act, full provisions are made for the issuance of summons, and its form, to whom it shall be directed, when it shall be made returnable, and how and by whom it shall be served. Provision is also made for the service of summons upon foreign and domestic corporations, also the manner of service when the defendant is a minor. These provisions are so full as to indicate that the legislature intended to cover the whole ground upon the question of summons. Again, by § 12 of the justices code, the summons must be returnable not more than twelve days from its date, and may be made returnable in three days after its issuance; while by the civil code a summons issued to another county than the one in which the action is brought, must be made returnable in not less than ten days nor more than sixty days from the date thereof. (Civil Code, § 61.) In the justices court the action is triable upon the return-day of the summons. But by the civil code no appearance of the defendant by answer or demurrer is required until twenty days after the return-day of the summons, and the action is not triable before the next succeeding term of court, and not then

unless the issues in the case have been made up ten days before such term. It is apparent that these provisions are inconsistent with each other, and that those in § 60 of the civil code are not in their nature applicable to an action before a justice of the peace. Besides, the jurisdiction of justices of the peace is limited, and therefore cannot be extended beyond the prescribed limits, nor can it be exercised in any other manner nor upon any other terms. There are restrictions not only upon the class and subject-matter of civil actions that may be brought before justices of the peace, but also upon the territorial extent of his jurisdiction. It is provided that "The jurisdiction of justices of the peace in civil actions shall be co-extensive with the county wherein they may have been elected, and wherein they shall reside." (Justices Code, § 1.) Being thus limited to his own county, he cannot send a summons to another county, and thus acquire jurisdiction of persons who are beyond the limits of the county where his court is held.

We think the ruling of the district court in disallowing the peremptory writ of mandamus is correct, and its judgment must therefore be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. A. HORN.

1. ROAD, *When not a Public Road.* Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years, is not sufficient to constitute it a public highway.
2. ROAD, *When not a Public Highway by Prescription.* Where a road has been traveled for more than fifteen years, but has not been established under the statutes of the state, and has not been expressly dedicated nor impliedly dedicated, unless by prescription or limitation, and the land over which it runs was for several of the first years vacant and unoccupied, *held*, that such road is not a public highway by prescription or limitation, unless the public, by its constituted authorities, took the possession of the road and used it and maintained it as a public highway for at least fifteen years.

35	717
36	186
35	717
70	181

The State v. Horn.

Appeal from Leavenworth District Court.

PROSECUTION for obstructing a public road. At the April Term, 1886, the defendant *Horn* was found guilty, and sentenced to pay a fine of \$50 and costs. He appeals. The material facts appear in the opinion, and in *The State v. Horn*, 34 Kas. 556, *et seq.*

J. P. Usher, for appellant.

Wm. Dill, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This case has once before been in this court. (*The State v. Horn*, 34 Kas. 556.) After its return to the district court, it was again tried before the court and a jury, and the defendant was again convicted, and was adjudged to pay a fine of fifty dollars and the costs of the suit. He again appeals to this court.

On the second trial, the state introduced evidence which tended to prove that A. Stephens resided at Lenape; that he had a son William, a young man, who generally signed his name "W. Stephens;" that this young man was very well known at that place; that the two owned a drug store at Osawatomie; that the son kept the drug store, though he was frequently at home at Lenape; that A. Stephens acted as one of the commissioners in locating the road, and that W. Stephens took no part therein. It will be remembered that it was W. Stephens, and not A. Stephens, who was appointed one of the commissioners. Only one of the commissioners out of the three appointed, acted in viewing and locating the road. The state then offered in evidence the records of all the proceedings had in, or having any connection with, the location or establishment of the road, and just such records as were introduced on the former trial, but the court excluded the evidence. The state then attempted to prove that the road had become a public highway by prescription, limitation, or dedication; but about the only evidence introduced which tended to show this is as

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follows: In April or May, 1868, William G. Harris, with a half-breed Indian, traveled along this road as an Indian trail. From this time on up to the present time the road has been more or less traveled. The land, however, over which this road ran, and the land in that vicinity, was at that time and for several years afterward open and unfenced, permitting people to travel where they pleased. On September 20, 1869, proceedings were commenced to lay out and establish a public county road in that vicinity, and on December 6, 1869, the proceedings culminated in the attempted establishment of this road as a county road, as stated in the case of *The State v. Horn*, supra. This road is the old Indian trail, and the road now in dispute. Some time after the supposed establishment of this road, but just when is not shown, the road was opened and improved by the road overseer, and has since been traveled, up to the present time. The land claimed to have been taken and appropriated as a public highway by the attempted establishment of this road, was not at that time fenced or occupied in any manner, nor was it or any of the land in that vicinity so fenced or occupied for several years afterward, except that the railway company operated its railway over a portion of such land, and it does not appear that the railway company has ever acknowledged or admitted that any public highway has ever been located or established over the ground over which the present road runs. The land over which the present road runs was granted to the railway company's predecessor by the act of Congress of July 1, 1862, for a right-of-way, (12 U. S. Stat. at Large, 489, *et seq.*;) and the road runs near to and parallel with the company's railway track. This action was commenced on August 18, 1884.

Now the question as to what the rights of the railway company are as between it and the United States, is a question which it is wholly unnecessary to decide in this case; for the case may be decided and finally disposed of as between the present parties without deciding such question. The railway company claims that under the facts of this case no public highway has been created where the present road is located,

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either by the foregoing proceedings, or by prescription or limitation, or by dedication; and it further claims that under the acts of congress and the Indian treaties giving to the railway company its right-of-way, no public highway could be so created. We shall assume, however, for the purposes of this case, and as the prosecution claims, that the railway company owns the land over which the road runs to such an extent and in such a manner that the road could be created and established as a public highway by legal proceedings under the statutes of Kansas, or by prescription or limitation, or dedication, notwithstanding the acts of congress and the Indian treaties, and notwithstanding the fact that the road is located on the railway company's right-of-way and near to and parallel with its tracks. But the question then arises: Has the present road been created a public highway in any such manner, or in any manner whatever? That the road has not been created a public highway by any kind of proceedings under the statutes of Kansas, is clear beyond all question. Nor has it been created a public highway by any express dedication; for no owner of the land—neither the Indians, nor the United States, nor the railway company, nor any one of its predecessors—has ever expressly dedicated the same as a public highway; and there has never been any implied dedication, unless it is such a dedication as arises from prescription or limitation. Therefore, if such road has ever become a public highway at all, it must have become such by prescription or limitation, or a dedication in the nature of prescription or limitation; and if it has become such in this way, then it must have become such only by the authoritative use of the same by the public as a highway for at least fifteen years, with the knowledge of the owner of the land; for fifteen years in this state is the limitation prescribed by statute for the commencement of civil actions for the recovery of real property held adversely to the owner. The mere fact that individuals—many or few—may have traveled along this road or over the same for more than fifteen years, is not enough to constitute it a public highway, where the land itself is vacant and unoc-

cupied, as this has been, and where no action has been taken by the public authorities to constitute the road a public highway, or to keep it in repair, or to maintain it as such. (*Smith v. Smith*, 34 Kas. 293, 301, and authorities there cited.) Individuals travel over the ground merely because it is convenient for them to do so, and generally without any expectation or design or authority to constitute the place where they travel a public highway; and by such traveling they cannot set in operation any prescriptive right, or any right by limitation. In order to start in operation any prescriptive right, or any right by limitation, to use a piece of ground as a public highway, the public by its constituted authorities must take the actual possession of the ground and use it as a public highway. (Angell on Highways, 3d ed., § 151.) Now if we are correct in this, then the present road was not a public highway when this action was commenced. The public by its constituted authorities did not take possession of this property as a public highway prior to the attempted establishment of the same as a public highway, which was December 6, 1869; and probably the public by its constituted authorities did not take the possession of this property *as a highway* for many months, possibly years, after that time. When it was first opened or worked by the road overseer is not shown, but it was more than fifteen years before this action was commenced. It was not fifteen years from December 6, 1869, when the attempt was made to establish this road as a public highway, to August 18, 1884, when this action was commenced. Indeed, it was not fifteen years from the time when the first legal proceedings were instituted to make this road a public highway, to the time when this action was commenced. Hence there is no room in this case for any right by prescription or limitation to operate, and under no aspect of this case can this road be considered as a public highway.

The judgment of the court below is erroneous. Errors were committed by the court below in the instructions given to the jury, and in the refusal to give instructions, and in not granting a new trial; and for these errors the judgment of the court

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below must be reversed, and the cause remanded for a new trial.

All the Justices concurring.

MICHAEL DARCY V. WILLIAM F. MCCARTHY.

1. **OFFICIAL LETTER—Evidence.** The copy of an official letter received by the register or receiver of any land office of the United States from any department of the government of the United States, that has been duly certified by the register or receiver having the custody of such letter, is admissible in evidence the same as the original; and where the official character of the letter is apparent upon its face, it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter.
2. **LAND OFFICE; Erroneous Entry, Canceled; Presumption.** The commissioner of the general land office has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions; and where an erroneous entry made by the register and receiver was canceled by the commissioner, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence.

Error from Ottawa District Court.

EJECTMENT, brought by *Darcy* against *McCarthy*. Trial at the May Term, 1884, and judgment for the defendant. The plaintiff brings the case here. The opinion states the material facts.

L. J. Crans, and *Thompson & Richards*, for plaintiff in error.
Chipman & Painter, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This was an action in ejectment, brought by Michael Darcy to recover from William F. McCarthy the possession of the northeast quarter of section 9, in township

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10 south, of range 5 west. The judgment rendered at the first trial was vacated upon a demand made under § 599 of the code, and the second trial was had before the court without a jury. To maintain his action, the plaintiff offered in evidence the duplicate receipt of the receiver of the United States land office at Concordia, Kansas, which is as follows:

“RECEIVER’S OFFICE, CONCORDIA, KANSAS.—No. 2495. Preëmption act of 1841; (see commissioner’s letter G, of September 10, 1883; September 14, 1884.)—Received from Michael Darcy, of Ottawa county, Kansas, the sum of two hundred dollars, and — cents, being in full for the northeast quarter of section No. 9, in township No. 10 south, range No. 5 west, containing one hundred and sixty and — hundredths acres, at \$1.25 per acre, \$200. E. J. JENKINS, *Receiver*.”

There was also offered in evidence by the plaintiff a certified copy of a letter of the commissioner of the general land office, which is as follows:

“WASHINGTON, D. C., September 10, 1883.—*Register and Receiver, Concordia, Kansas—Gentlemen*: I am in receipt of your letter of the 31st ult., transmitting preëmption proof of Michael Darcy for my consideration. Darcy filed D. S. 10,186 for N.E.¼ 9, 10 S., 5 W., Dec. 11, 1882; alleged settlement, Nov. 6, 1882. W. F. McCarthy made H. E. 16,880, Nov. 11, 1882. There is no reason why, upon proof being made to your satisfaction, you should not allow Darcy to make his cash entry, he having complied with the requirements of the law in the matter of giving notice of such intention. I return the papers transmitted with your letter.

Respectfully, N. C. McFARLAND, *Commissioner*.”

This, with testimony showing the value of the possession to be \$100, was all the evidence offered by the plaintiff, and the defendant then offered in evidence a copy of another communication from the commissioner of the general land office, which, with the certificate of the register of the local office, is as follows:

“DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., October 4, 1883.—*Register and Receiver, Concordia, Kansas—Gentlemen*: By my letter G, of September 10, 1883, you were instructed to allow Michael Darcy to make entry, upon proofs admitted, of N.E.¼ 9,

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10S., 5 W., recorded by his D. S. 10,186. It appears from a letter of Messrs. Olney & Co., who write in behalf of Wm. F. McCarthy, who made H. E. 16,880 on said tract Nov. 11, 1882, and the records of this office corroborative of their statements, that McCarthy had instituted a contest against H. E. 15,673 by Darcy on this same land, which he prosecuted to a final decision, canceling said H. E. 15,673, October 30, 1882. This action gave McCarthy a preference right for thirty days, under act of May 14, 1880. As McCarthy made his H. E. October 11, 1882, he was strictly within the law, and any action allowing Darcy's entry was erroneous. I have therefore now to rescind said letter of September 10, 1883, of which action you will advise Darcy. Respectfully,

N. C. MCFARLAND, *Commissioner.*"

"U. S. LAND OFFICE, CONCORDIA, KANSAS, November 26, 1883.—I hereby certify that the above and foregoing is a true copy of the U. S. land commissioner's letter G, now on file among the records of this office.

S. H. DODGE, *Register.*"

The plaintiff objected to the admission of this testimony, but the court received it, and gave final judgment in favor of the defendant; and the only ground of reversal urged here is the admission of the commissioner's letter. One objection is, that the letter was not properly certified. We deem the certificate to be sufficient. Copies of any official letter or communication received by the register or receiver of any land office of the United States, from any department of the government, that have been duly certified by the register or receiver having the custody of such official letter or communication, are admissible in evidence, the same as the original. (Code, §384.) The certificate is claimed to be defective because it fails to show that the letter to which it is attached is the copy of an official letter. It appears to be a letter addressed by the commissioner of the general land office to his subordinates upon a matter which clearly comes within the scope of the official duty of those officers. The official character of the letter is clearly disclosed upon its face, and no statement in the certificate could change or make its character more apparent.

It is also claimed that the action of the register and receiver

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in allowing the cash entry of the plaintiff is conclusive on the land department, and that the commissioner had no authority to do that which his letter attempted to do. Although proof of the right to enter land must be made to the satisfaction of the register and receiver, they are not the final arbiters of such right. They make returns of entries of land to the general land office, which is under the charge of the commissioner. That officer has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions. The entry relied on by the plaintiff was allowed by mistake and without authority of law, and it was clearly competent for the commissioner to cancel and set it aside. (*Bellogs v. Todd*, 34 Iowa, 31.) It seems that before the entry was made the plaintiff and defendant had both settled upon and were seeking to acquire title to this land. The plaintiff then claimed it under a homestead entry, but the defendant instituted a contest, which resulted in the decision made October 30, 1882, canceling the entry. Under an act of congress, this gave McCarthy, the successful contestant, thirty days in which to enter the same land. (21 U. S. Stat. at Large, ch. 89, § 2.) During this time a preference was given to the defendant, which was availed of and exercised by him on November 11, 1882, when he made a homestead entry. This homestead entry gave the defendant the superior right, and barred the plaintiff from acquiring any right to the land until the entry was contested and canceled. Notwithstanding this, the officers of the land department, through a mistake, permitted a filing to be made on the land by the plaintiff on December 12, 1882, in which he claims settlement on November 6, 1882. As the land had already been taken, and was not subject to entry by the plaintiff, this mistaken action of the officers gave him no right. It is argued for the plaintiff that under § 383 of the code, his duplicate receipt is proof of title against all but the holder of the actual patent, which is not in the hands of the defendant. This is a rule of evidence prescribed by the code, and is applicable in a controversy between citizens where the duplicate receipt is held with

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the concurrence of the United States authorities. The title to the public lands belongs to the United States, and congress is given full authority to dispose of the lands, and to make all needful rules and regulations respecting the same. (U. S. Const., art. 4, § 3.) A land department has been created by congress and rules prescribed for the disposal of the public lands, and to the officers of that department the duty of selling and disposing of the lands is committed. They can only sell or dispose of these lands in the manner prescribed by congress. In disposing of them there are doubtless many mistakes made, but the matter is within the control of the land department until the patent issues, and the mistakes may be corrected by the officers of that department. The entry of the plaintiff, having been made without authority, was rightfully canceled and set aside by the commissioner, and the effect of the duplicate receipt as evidence of title was destroyed. It being within the scope of the duties of the commissioner to make the correction and to cancel the erroneous entry, it will be presumed in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence. His action left the whole matter before the land department of the government for adjustment, where the rights of the parties could be further contested, and an appeal from the decision of the commissioner could be taken to the secretary of the interior. Whatever may be the status of the controversy between the parties there, it is plain from the evidence in the record here, that the plaintiff was not entitled to recover.

The judgment of the district court will be affirmed.

All the Justices concurring.

RICHARD W. REED v. THOMAS G. NEW.

1. **EVIDENCE; Immaterial Question.** Where the question whether the defendant had an insurance on certain property, or not, arises incidentally in the case, and the plaintiff proves that he had, and the defendant afterward, by his own testimony, shows that he had, it is immaterial whether the evidence showing in the first instance that he had such an insurance is competent, or not.
2. **HORSES — Value — Competent Witness.** Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto.
3. ——— *Held,* That there was no error in charging the jury.

Error from Dickinson District Court.

ACTION brought by *New* against *Reed*, to recover \$1,373.50, the alleged value of certain personal property. Trial at the January Term, 1885, and judgment for plaintiff for \$1,250. The defendant brings the case to this court. The opinion sufficiently states the facts.

John H. Mahan, for plaintiff in error.

W. S. Stambaugh, and *J. R. Burton*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Thomas G. New against Richard W. Reed, to recover \$1,373.50, the alleged value of certain personal property, consisting of horses, buggies, harness, etc., used in carrying on and conducting a livery stable, which property it is alleged the defendant intentionally burned and destroyed by fire. The answer was a general denial. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant for \$1,250, and the court

rendered judgment accordingly. The defendant brings the case to this court, and asks for a reversal of the foregoing judgment.

The right of the plaintiff to recover depends solely upon the question whether it was the defendant, or some one else, who set the fire to the livery stable which consumed it and the plaintiff's property; and the only proof that tended to show that it was the defendant who started the fire, was purely circumstantial evidence. There was no direct testimony introduced on the trial tending to show that the defendant started the fire, while his own testimony was that he did not. It appeared at the trial that for some time prior to the burning of the livery stable, and up to within five days of that time, the defendant carried on and operated the livery stable himself; that he then owned the entire stock and materials necessary for that purpose, and that he also owned two sheds attached to the livery stable, but that he did not own the stable itself, but only had a lease thereof. It also appeared that prior to the fire, the defendant's lease expired, and that the plaintiff leased the stable from the owners thereof, and had taken possession of it. The defendant, however, owned the following property, which still remained in the stable: Six horses, four double sets and four single sets of harness, four saddles, and some other articles; and he also owned the two sheds above mentioned. All this property was consumed by the fire, except three of the horses. The plaintiff also had a large amount of property in the stable, all of which was consumed by the fire, except one horse. The plaintiff's property destroyed by the fire was found by the jury to be worth \$1,250. The value of the defendant's property destroyed by the fire was about \$650. The plaintiff prosecuted this action upon the theory that the defendant set the fire to the stable for the following reasons: For revenge against the owners of the stable for renting it to the plaintiff, and for revenge against the plaintiff because he procured a lease thereof and deprived the defendant of the use of the same; and the plaintiff also introduced evidence for the purpose of showing that the de-

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fendant had his own property insured for more than it was worth, and therefore that he would not lose anything by having it destroyed by fire. The defendant objected and excepted to the introduction of this evidence; and whether the introduction of such evidence constitutes material error or not is the principal question involved in this case, and the first one which we shall consider. It was clearly proper for the plaintiff to prove that the defendant had an insurance on his property, but whether the evidence introduced to prove this fact was competent or not is the real question which the defendant (plaintiff in error) desires to present. We hardly think that we need to consider this question, for the defendant himself proved by his own testimony that he had an insurance on the property; that he had a sufficient insurance to cover all the property destroyed; that the property destroyed was worth about \$650, and that he received from the insurance company by way of compromise \$500. This was a waiver of the original error, if any error was committed.

There does not appear to have been any claim in the case that the original insurance was excessive; nor does it appear that in fact it was excessive. The defendant's property in the barn was in all probability at the time the insurance was effected worth vastly more than the amount of the insurance; and while he had removed a large portion of the property from the barn before the fire, yet it appeared from the evidence that he had removed it for a sufficient reason. In fact, all of it should have been removed before that time, as the defendant no longer had any right to the premises. It will also be noticed that the question whether the defendant had an insurance on his property, or not, arises only incidentally in the case, and not directly. The suit is not an action on the insurance policy.

It was necessary on the trial for the plaintiff to prove the value of the property for which he sued and which was destroyed by fire, and in doing so he introduced the testimony of himself and several other witnesses; and it is claimed that the court below erred in permitting these witnesses to testify

with regard to the value of the property, for the reason that they were not shown to have sufficient knowledge of the value of such property. And here again we might say, that it is not necessary to decide whether the court erred in admitting the testimony without sufficient preliminary proof of the witnesses' knowledge of values having first been introduced, for additional evidence of their knowledge of values was afterward introduced. The question is, whether it appears from the whole of the witnesses' testimony that they had sufficient knowledge of the value of this kind of property to testify intelligently with regard thereto. The plaintiff testified with regard to the value of the horses. He stated that he had some knowledge of the value of this kind of property. It was also shown that he was 38 years of age; that for several years he had been a farmer in that county, and had been such up to about eighteen months before the fire occurred, when he removed to the city of Abilene, where he remained for about eighteen months before the fire occurred; that he had dealt in cattle and horses; that he had leased the livery stable and had stocked it with horses of his own, and that he had been in the possession of the livery stable and in the livery business for about five days before the fire occurred. This, we would think, gave him sufficient knowledge of the value of horses to enable him to testify with regard thereto. Indeed, the most of people, and particularly farmers and livery-stable men, have some knowledge of the price of horses. Besides, the defendant did not attempt by cross-examination or by other evidence to dispute the values placed upon the horses by the plaintiff. It is also claimed that the evidence of the witness Worley, with regard to the value of harness, whips, lap-ropes, etc., was not competent. We however think otherwise. He was shown to be a dealer in such articles, and evidently knew their value. In the absence of evidence to the contrary, such at least will be presumed.

It is further claimed that the court below erred in charging the jury. Now we think the instructions of the court were very fair as toward the defendant; and the defendant did not

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ask for any additional instructions, nor, indeed, for any instructions.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. ALBERT WHITAKER.

1. *INSTRUCTION, Not Applicable to Facts.* An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in evidence.
2. ——— *Erroneous Instruction.* Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury, not warranted by the facts in evidence, is erroneous; and unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside.

Appeal from Osborne District Court.

ON June 1, 1885, the following information—omitting court, title, and verification—was filed in the district court of Osborne county:

“I, the undersigned, county attorney of said county, in the name, by the authority and on behalf of the state of Kansas, give information that on the 19th day of May, 1885, in said county of Osborne and state of Kansas, one John R. Miller, John Cranshaw, and Albert Whitaker, did then and there unlawfully, feloniously, purposely and of their deliberate and premeditated malice, make an assault in and upon one Delbert J. Tunison, then and there being, and that the said John R. Miller a certain double-barreled shot-gun then and there loaded and charged with gunpowder and shot, which said shot-gun he, the said John R. Miller, then and there in both of his hands had and held to, against and upon him the said Delbert J. Tunison, then and there purposely, and of his deliberate and premeditated malice, did discharge and shoot off,

36	731
52	355
35	731
176	723

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and that the said John R. Miller with the shot-gun aforesaid, then and there, by force of the gunpowder aforesaid, shot, discharged and sent forth as aforesaid out of the said shot-gun by him the said John R. Miller, then and there so as aforesaid discharged and shot off, him the said Delbert J. Tunison, in and upon the left side of the neck of him the said Delbert J. Tunison did strike, penetrate and wound, giving unto him the said Delbert J. Tunison, by the means and in the manner aforesaid, one mortal wound of the length of two and one-half inches, and of the depth of six inches, of which said mortal wound he the said Delbert J. Tunison shortly died, to wit, in about three hours after said wound was inflicted. The said defendants, John Cranshaw and Albert Whitaker, then and there by the means and in the manner aforesaid, aided, abetted and assisted the said John R. Miller to do as above set forth. Thesaid John R. Miller, John Cranshaw and Albert Whitaker in manner and by the means aforesaid, purposely and of their deliberate and premeditated malice, him the said Delbert J. Tunison did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas.

A. SAXEY, *County Attorney.*"

Trial was begun October 12, 1885, before the court with a jury. On October 16th the jury returned a verdict against the defendant, *Albert Whitaker*, finding him guilty of murder in the first degree. On the same day the defendant filed his motion in arrest of judgment, and also his motion for a new trial. On October 17th both the motions were overruled. The defendant was sentenced in accordance with the verdict. He appeals.

Hays & Pitts, and Walrond, Mitchell & Heren, for appellant.

S. B. Bradford, attorney general, for The State.

The opinion of the court was delivered by

HORTON, C. J.: The information filed in this case charges John R. Miller with the murder of Delbert J. Tunison, and also charges John Cranshaw and Albert Whitaker with having aided, abetted and assisted in the commission of the crime.

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John R. Miller was convicted of murder in the second degree, from which he appealed to this court. The opinion of this court was handed down, affirming that conviction. (*The State v. Miller*, ante, p. 328.)

Whitaker was convicted of murder in the first degree, at the October term of the district court of Osborne county for 1885, from which conviction he appeals.

It is claimed that the information upon which he was tried charges only an assault upon Delbert J. Tunison, and that if it charges anything more than an assault, it does not charge murder in the first degree. While the language of the information is subject to some criticism, we think it is sufficient within the authority of *Smith v. The State*, 1 Kas. 365, and *The State v. Brown*, 21 id. 38, as an information for murder in the first degree. It alleges, among other things, that on May 19th, 1885, in the county of Osborne and state of Kansas, John R. Miller, John Cranshaw and Albert Whitaker did then and there unlawfully, feloniously, purposely, and of their deliberate and premeditated malice, make an assault upon Delbert J. Tunison; that John R. Miller did, purposely and of his deliberate and premeditated malice, shoot off and discharge against the said Tunison a double-barreled shot-gun, loaded with gunpowder and shot, then and there held in his hands, giving him a mortal wound, of which he died in a few hours thereafter; that John Cranshaw and Albert Whitaker then and there, by the means and in the manner aforesaid, aided, abetted and assisted John R. Miller to do the acts set forth, and that said John R. Miller, John Cranshaw and Albert Whitaker, in the manner and by the means stated, purposely and of their deliberate and premeditated malice, did kill and murder said Tunison. The information, taken together, alleges that the killing of Tunison was willful, deliberate, and premeditated.

The evidence on the part of the state conduced to show that on Saturday, May 16, 1885, a difficulty occurred between Tunison and his wife; that her father, Jeremiah Miller, who lived a few miles away, learned of the trouble on Sunday

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evening, and went at once to the residence of the defendant —Whitaker—who was a near neighbor of the Tunisons, and remained until Monday forenoon. In the forenoon of that day, while Tunison was absent from home, Jeremiah Miller, accompanied by Albert Whitaker, went to Tunison's house, hitched up a pair of horses found there to a wagou, and took Mrs. Tunison and her children to his home, carrying with him some goods and a cow, which property, together with the horses, Mrs. Tunison claimed as her own; that on Sunday preceding the killing of Tunison, as James Dwyer and wife were driving up to the house of Richard Dey, Whitaker came out from the stable up to the wagon, and handed Dey a chain, saying "Here's your chain; I will let you take it home;" that Dey then reached down in Whitaker's shirt-pocket and pulled out a pistol; that Dey asked Whitaker what use he had for it; that he answered, "He might have use for it before to-morrow morning;" that Dey asked him who he was about to get into trouble with, and that Whitaker said, "The man in the stone house," pointing to where Tunison lived; that he said he had been looking in his trunk for cartridges, but had not found any; that he was going up to where Dey was to see if he could get some; that on the same Sunday night Whitaker said to George Piatt "He wanted to see Dick Dey to get some cartridges of him; that he had laid out a couple of men in his time, and expected to have another laid out before sundown—a person about six feet and a half tall;" that upon being asked "Who he was in trouble with," he said "His cousin—Del. Tunison;" that Whitaker brought word to the Millers on Monday, the 18th, that Tunison was to come up that night and take the horses away; that John R. Miller and Charles Miller are sons of Jeremiah Miller and brothers to Mrs. Tunison; that John Cranshaw is a son-in-law of Jeremiah Miller, and Albert Whitaker, the defendant, a cousin of Tunison, and that all of these persons were at Miller's the night of the murder; that about eleven o'clock P. M. of said May 18th, John R. Miller and Charles Miller went down to the stable in anticipation of Tunison coming to re-

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take the horses; that about twelve or one o'clock that night John R. Miller, without any excuse or justification, shot and killed Tunison at the stable; that on Tuesday morning, May 19th, Whitaker told John Loe "Del. Tunison was dead; that he came up to the Millers for the property the night before, and John Miller shot him;" that upon being asked whether Tunison tried to get away, he said "No, we surrounded the stable;" that Mrs. Loe asked who was there, and he answered, "John Cranshaw, Charley and John Miller, and himself; that John and Charley Miller were in the stable when Tunison came for the horses, and Cranshaw and himself were on the outside of the stable."

Upon the evidence introduced by the state, there was sufficient before the jury to justify the verdict rendered, because if the killing of Tunison by Miller was wholly without justification, and Cranshaw and Whitaker were outside of the barn while John and Charles Miller were in the inside, the evidence is amply sufficient to show that Cranshaw and Whitaker were aiding and abetting the commission of the crime; therefore, if no question was before us other than the one urged so strenuously, that the evidence does not support the verdict, we would necessarily decide the appeal adversely.

A serious question, however, is presented upon the following instruction of the trial court:

"If you believe from the evidence that John R. Miller was justified in killing Tunison, then you will find the defendant not guilty, unless you shall find that defendant falsely reported, directly to John R. Miller, or through others to John R. Miller, certain threats, which he claimed deceased had made to him with reference to the persons and property of the Millers, and thereby produced in the mind of John R. Miller such a reasonable and honest conviction that he (John R. Miller) was in danger of his life from Tunison at the time of the shooting, as would justify John R. Miller in killing Tunison, when, as a matter of fact, the deceased, Delbert J. Tunison, did not utter to the defendant the threats which he so reported, directly or indirectly, to John R. Miller. Under these circumstances, if you shall find that defendant falsely reported such threats, directly or indirectly, or through others, to John R.

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Miller, with intent to cause John R. Miller to kill deceased, and you shall find that John R. Miller did kill the deceased by reason of the honest and reasonable fear, induced by said threats so communicated, and that it was not actually necessary for John R. Miller to kill deceased to preserve his own life, then you may find the defendant guilty, although you may believe John R. Miller was justified in killing the deceased, or you may find the defendant guilty of a higher degree of crime, if any, than you believe John R. Miller guilty of."

On the part of the defense, evidence was offered showing that on May 18th Delbert J. Tunison said to Richard Dey, "He would go up to the Millers', steal the horses, murder the outfit, set the things on fire, and skip the country." William Price also testified that he saw Tunison with Whitaker on May 18th, and that Tunison said to Whitaker at the time, "He was going over to get his brother Bill and a couple of six-shooters, and go and get his property at the Millers'." Mrs. Tunison testified that on Monday, the 18th, between five and six o'clock, after she had reached her father's house, Whitaker came to the house and told them "Del. said he would go over and get his brother Will and two six-shooters, and come up and take his property, set the ranch on fire, and if any of us interfered, he would kill us;" that "there were present at this conversation, besides herself, her father and mother, Mrs. Cranshaw, and her three younger sisters; that John R. Miller and John Cranshaw came to the house that night at about nine o'clock, and she communicated to them the threats Whitaker said Del. had made." Mrs. Jeremiah Miller also testified that these threats reported by Whitaker as coming from Del. Tunison, were communicated by her to John R. Miller, on the evening of May 18th.

What occurred at the stable when Tunison was killed, on the night of May 18th, according to the defense, is as follows:

"Charles Miller took a gun from his father's house down to the stable that night a little after eight o'clock, and set it down just on the inside, and then went back to the house and watched to see if anyone came to the stable; that about a quarter of eleven he heard a noise at the stable, and John went with him down there; that both of them went into the

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stable and sat down; after being there about an hour, Del. Tunison came into the stable at an opening, went up to a horse which belonged to Cranshaw; he untied it and took it out; he tied this horse to a post near by and returned to the stable; at this time John had the gun which Charles had taken to the stable. When Tunison came in, John said to him, 'Halt;' Tunison said, 'Go to hell, you damned son-of-a-bitch; I've got the drop on you, and I shall kill you for luck,' drawing a revolver from his coat. As these words were uttered, John Miller shot Tunison in the neck; he fell backward, and died in a few hours afterward."

In regard to the instruction complained of, the argument of the state is as follows:

"A homicide is committed. A deliberately and premeditatedly procures B to do it. Knowing that the deceased will be at a certain place at a certain time, he reports to B false threats of an intent on the part of the deceased to do great bodily harm to B. At the time and place B meets the deceased, and his mind being poisoned by the communications of A, he believes that he is in danger of his life or of great bodily harm, and to prevent it the homicide is committed by him. So far as B is concerned, the homicide is justifiable. But A, deliberately and premeditatedly intending to accomplish the killing of the deceased, adopted such means as would effect that end, and the killing results by reason of the means A deliberately adopted for that purpose. A would be guilty of murder in the first degree, although B's act, so far as he alone was concerned, was justifiable. B was but the blind, irresponsible instrument of another mind."

The proposition thus stated is a sound one, but we do not think the evidence in the case warrants the instruction. It is probably true that John and Charles Miller were at the stable on the night of the killing of Tunison, on account of the threat reported by Whitaker that Tunison said he was coming after the horses which had been taken away from his house. But there is sufficient evidence in the record to show that Tunison intended to come that night to retake the horses, and it is undoubtedly true he gave out that he was coming so to do. This is corroborated by the fact that he did come that very night for that purpose.

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The court in its instruction suggested that this threat, as well as the others, was falsely reported by Whitaker; the suggestion of its falsity, in the absence of any proof, ought not to have been made by the court, and it was not consistent with the evidence for the court to intimate that this threat was not uttered by Tunison. There is no affirmative evidence in the record that the other threats reported by Whitaker to have been made by Tunison, were not so made, but the other threats are so extravagant and so unlikely to have been made by any person about to commit such acts, that we suppose the jury might have inferred the threats "to burn the house and kill the Millers" were never uttered by Tunison.

We cannot perceive that the extravagant threats about the killing and burning, reported by Whitaker to have been made by Tunison, induced in John R. Miller such an honest and reasonable fear as caused him to believe it was actually necessary to kill Tunison to preserve his own life. Upon the facts disclosed in the record, we do not think that the court ought to have intimated to the jury that the threats so communicated were likely to have that effect upon Miller. If the killing of Tunison was justifiable, it was upon the testimony of the defense that when he entered the opening of the stable at the time he was shot, he drew a revolver as if to shoot Miller, at the same time stating: "I've got the drop on you, and I shall kill you for luck." The defense attempted to show that Tunison was not only trying to get possession of the horses which his wife had taken away, but was also attempting to steal the horse owned by Cranshaw, and when Miller called on him to halt as he was entering the stable, he attempted to take his life. Upon the evidence offered by the state, the threats communicated to John R. Miller were no justification to Miller for the killing of Tunison. Upon the theory of the defense, the threats communicated were not the direct cause of the killing of Tunison.

Again, the threats reported by Whitaker were communicated to John and Charles Miller several hours before the

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killings of Tunison. There was ample time after the report of these threats for the parties to have had Tunison arrested, if these threats in any way created fear in their minds that their lives were in danger, or great bodily harm likely to occur; no such steps were taken. (*The State v. Rose*, 30 Kas. 501.) Upon no view of the evidence embraced in the record can we assume that John R. Miller was an "innocent agent" in the killing of Tunison; nor does the evidence show in any way that he was the blind and irresponsible instrument of Whitaker. No fair inferences from the facts in evidence upon the trial, warrant the theory that John R. Miller was the "innocent agent." Miller was either guilty of murder in killing Tunison, or else the homicide was justifiable on account of the words and acts of Tunison at the time that Miller shot him. Only upon the theory that John R. Miller was the "innocent agent" of Whitaker, could the court have given the instruction complained of. It is impossible for us to say that this instruction was not the controlling one with the jury. In our opinion, it is wholly erroneous.

Because of the instruction given, herein referred to, the judgment is reversed, and the prisoner will be remanded for a new trial.

All the Justices concurring. •

35	740
38	49
35	740
47	756
35	740
60	16
60	17

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. MICHAEL ROACH.

1. RAILROAD COMPANY; *Carrier over Connecting Lines*. While a railroad company cannot be compelled to transport beyond its termini, it is well settled that it may lawfully contract to carry passengers and property over its own and other lines to a destination beyond its own route, and when such a contract is made it assumes all the obligations of a carrier over the connecting lines as well as its own.
2. ——— *Carriage on Connecting Lines; Loss; Liability*. The sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines the same as on its own.
3. ——— *Liability of Each Carrier*. Each carrier is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines to whose negligence the loss or injury can be traced, will also be liable to the owner.
4. EVIDENCE; *Community of Interest; Last Carrier, When not Liable*. The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination.

Error from Reno District Court.

ACTION brought by *Roach* against *The Railroad Company*, to recover the value of certain baggage. Trial at the September Term, 1884, and judgment for plaintiff for \$227.32. The defendant company brings the case to this court. The opinion states the material facts.

A. A. Hurd, John Reid, and W. C. Campbell, for plaintiff in error; *Geo. W. McCrary*, general counsel.

H. Whiteside, and R. A. Campbell, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by Michael Roach against the Atchison, Topeka & Santa Fé Railroad Company, to recover for baggage alleged to have been lost and injured while in transit from New York city to Hutchinson, Kansas. A verdict was given in favor of Roach for \$227.32, and judgment rendered accordingly. The railroad company brings the case here, and complains of the charge of the court and of the insufficiency of the evidence. The essential facts of the case may be briefly stated: On February 28, 1881, Roach purchased eight coupon tickets for the passage of himself and family from the city of New York to Hutchinson, Kansas, over the New York, Lake Erie & Western Railroad, Grand Trunk Railway, Michigan Central Railroad, Chicago, Burlington & Quincy Railroad, Hannibal & St. Joseph Railroad, and Atchison, Topeka & Santa Fé Railroad. The tickets were purchased from one Henry Opperman, who had an office in New York, and who at the same time caused several pieces of baggage to be checked through to Hutchinson, using checks on which the names of the roads mentioned were stamped. As there was more baggage than could be carried on the tickets purchased, Roach was required to and did pay \$62.15 for extra baggage, and Opperman gave him duplicates of the checks, which he retained. The defendant in error and his family made the journey over the roads mentioned, and the tickets were honored and accepted for their passage, and the servants of the several companies detached the coupons or portions of the ticket that represented the passage-money over the different roads. When the passengers reached Hutchinson application was made for the baggage, and it was found that some of it had been lost, and portions of it badly injured.

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The testimony tended to show that the baggage was delivered to the first carrier in good condition, but on what road or roads the loss or injury occurred, was not shown. The plaintiff below sought to recover upon two theories: one that Opperman, who sold the tickets, was the agent of the A. T. & S. F. Rld. Co., and that that company undertook to carry the passengers and baggage over the entire route, and that, being the contracting carrier, it was liable for the loss and injury regardless of where and upon what road it occurred. The other theory is, that the several roads constitute a connected and united line, and that the combination and running arrangements existing among the owners of the roads were such as amounted in effect to a partnership, and therefore the injury and loss was a common liability, and each and all of the companies are liable, no matter upon what part of the line the loss occurred. No recovery can be had upon the first theory, for the reason that the testimony wholly fails to establish that Opperman was the agent of the defendant company. Some of the witnesses for Roach spoke of Opperman as the agent of that company, while others stated that he was the agent of the New York, Lake Erie & Western Railroad Company. It was however developed upon cross-examination, that they had no knowledge of his authority or agency beyond his action in the sale of the tickets and the checking of the baggage. Opperman testified that he was the authorized agent of the New York, Lake Erie & Western Railroad Company, and sold the tickets for, and as the agent of that company, and that he did not represent and was not the agent of the defendant company. There was other testimony to the same effect, and also that when Roach purchased his tickets, the defendant company had no tickets on sale in or about the city of New York. The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the company on that ground. Where then is the liability? It is contended by the railroad company that the New York, Lake Erie & Western Railroad Company, being the first car-

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rier, is alone liable. While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines to a destination beyond its own route; and when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. (*Berg v. A. T. & S. F. Rld. Co.*, 30 Kas. 561; *Lawson's Contracts of Carriers*, § 235; *Hutchinson on Carriers*, § 145; *Thompson's Carriers of Passengers*, p. 431; 2 *Rorer on Railroads*, p. 1234.) Of course a railroad company or other common carrier may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier, amounts to an undertaking to carry to the ultimate destination, wherever that may be; and in the absence of any conditions or limitations to the contrary, will make it liable for a loss occurring upon the connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. (*Lawson's Contracts of Carriers*, §§ 238, 239, 240.) But where a railroad company sells a through ticket for a single fare over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket and the checking of the baggage for the whole distance, is some evidence of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an ex-

1. Railroad company; carrier over connecting lines.

press one, but may arise by implication and may be established by circumstances, the same as other contracts. In Wisconsin a passenger purchased a through ticket from the Chicago & Milwaukee Railway Company from Milwaukee to New York city, and at the same time delivered her trunk to that company, and received therefor a through check to New York city. Upon arrival at New York the trunk was found to have been opened and some of the articles taken therefrom. The supreme court, in ruling upon the effect of the railway company issuing the through ticket and check, stated that—

“The ticket and check given by the Chicago & Milwaukee Railway Company implied a special undertaking by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This we think must in legal contemplation be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket and gave a through check for the trunk, and received the fare for the entire route.” (*Candee v. Pennsylvania Rld. Co.*, 21 Wis. 582; *Ill. Cent. Rld. Co. v. Copeland*, 24 Ill. 332; *Carter v. Peck*, 4 Sued [Tenn.], 203; *Railroad v. Weaver*, 9 Lea, 38; *B. & O. Rld. Co. v. Campbell*, 36 Ohio St. 647; same case, 3 Am. & Eng. Rld. Cases, 246; 2 Rorer on Railroads, p. 1001.)

From the authorities, we conclude that the sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which in the absence of other conditions or limitations and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation to a point be-

2. Carriage on connecting lines; loss; liability.

3. Liability of each carrier.

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yond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. (Hutchinson on Carriers, § 715; *Aigen v. Boston & Maine Rld. Co.*, 132 Mass. 423; *Railroad v. Weaver*, 9 Lea, 39.)

The defendant company cannot, however, be held liable upon that ground, because there is no evidence that the baggage was injured or lost while in the custody of that company, nor was it in fact shown upon what part of the route the injury or loss occurred.

The other theory upon which a recovery is sought is, that the several connecting lines over which the baggage was to be carried should be treated as a continuous and united line, and that the arrangements made by the several lines for through traffic was such as to constitute them a partnership. There is a singular lack of testimony in the case, not only respecting the terms of the contract with the passenger, but also in regard to the relations existing among the several carriers. Not a word of testimony was introduced as to the running arrangements between the companies, nor the basis upon which through business was done. The practice or custom of the companies in the past was not shown, neither was there any proof that they had ever coöperated, or had done any through business beyond the transaction in question. It was not even shown what the form of the tickets was, nor what were the stipulations, if any, printed on them. There was in fact no evidence upon which to predicate a theory of partnership, or that each of the companies was the agent of all the others, except the single transaction of selling the tickets and checking the baggage. It is doubtless true that arrangements are frequently made among railroad companies whose lines connect, for through traffic, which constitute them partners. Such an arrangement is greatly to the advantage of the companies; the convenience which it affords the public invites business, and swells the traffic of the companies engaged in the joint enterprise. These arrangements among associated lines render it

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difficult for the passenger or shipper, in case of loss or injury of his property, to ascertain where the loss occurred; but no such difficulty lies in the way of the railroad companies; they have the facilities and can easily trace the property to the company which caused the injury or loss. In interpreting the agreements and conduct of associated lines engaged in a through traffic, public policy and the inconvenience mentioned should be considered, and they should be fairly and liberally interpreted towards the patrons of the lines, holding the companies, where it is admissible under the rules of law, to a common liability as partners. But such arrangements for through traffic cannot be held to be a partnership, unless there is a

4. Evidence; community of interest; last carrier, when not liable.

community of interest among the companies, and under which each shares the profits and losses of the enterprise. The mere sale of a through coupon ticket over the connecting lines of several companies, and the checking of the baggage to the end of the route, does not show such a community of interest as would make them partners *inter sese*, or as to third persons. This question has been directly adjudged. A through ticket was purchased for passage from New York to Washington over three lines of railroad which constituted a through line for the transportation of passengers and freight, and the passenger purchasing the ticket received a through check for her baggage. It appeared that the fare received for through tickets was accounted for by the company selling the tickets to the other lines according to certain established rates, but there was no division of losses; and it was held in an action against the last carrier, to recover for lost baggage, that the first carrier was liable for losses occurring on its own line, as well as any other connecting line throughout the whole distance, but that the arrangement of the three companies for the sale of through tickets and the issuance of through checks, while it resembled a partnership, did not constitute one, nor make any of the connecting carriers liable for a loss not occurring on its own line. (*Croft v. B. & O. Rld. Co.*, 1 McArthur, 492.)

In *Hartan v. Eastern Railroad Co.*, 114 Mass. 44, it was ruled that arrangements between connecting roads forming a continuous line for the sale of through coupon tickets, which enabled passengers to pass over all the roads without change of cars, did not imply joint interest or joint liability. In another case, where several carriers whose lines connected made an agreement among themselves to appoint a common agent at each end of a continuous line to sell through tickets and receive fare, it was held that this arrangement did not constitute them partners as to passengers who purchased through tickets, so as to render each of the companies liable for losses occurring on any portion of the line. (*Ellsworth v. Tartt*, 26 Ala. 733.) A somewhat similar case was decided in New York. There a passenger purchased a through ticket from New York to Montreal over several connecting lines of railroad, owned by several companies. The ticket was a strip of paper divided into coupons, whereof one was to be detached and surrendered to the conductor of each line on the route. The passenger, instead of giving his valise into the charge of the agent of the company and receiving a check therefor, kept it in his own charge to the terminus of the line of the first carrier, where he delivered it to the agent of the connecting line, who checked it through to another point on the road. It appeared that an arrangement had been entered into between the various lines from New York to Montreal to connect regularly. Tickets were sold in New York for the entire route or intermediate places, under the direction of a general agent, who was paid by the several companies. The rate of fare was different on the different roads, and each company received its own proportion of the whole fare or passage-money at the close or at the beginning of every month, according to the established rates of fare. It was held that there was nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage, so as to make one of them liable in common with the others for the loss of the valise. It was decided that

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"the arrangement may be beneficial to them as well as to the public, inasmuch as by facilitating travel, it may tend to increase it, but that would not create that joint interest, that community in profit and loss, which is essential to the existence of a partnership." (*Straiton v. New York & New Haven Rld. Co.*, 2 E. D. Smith, 184; *Hot Springs Rld. Co. v. Triple & Co.*, 42 Ark. 465; same case, 18 Am. & Eng. Rld. Cas. 562; *Aigen v. Boston & Maine Rld. Co.*, 132 Mass. 423; same case, 6 Am. & Eng. Rld. Cas. 426; *Darling v. Boston & Worcester Rld. Co.*, 11 Allen, 295; *Kessler v. Railroad Co.*, 61 N. Y. 538; *Irwin v. Rld. Co.*, 92 Ill. 103; *Insurance Co. v. Rld. Co.*, 104 U. S. 146; same case, 3 Am. & Eng. Rld. Cas. 260.)

Among the cases relied on by the defendant in error is *Hart v. Rld. Co.*, 4 Selden, 37. In that case the defendant, which was one of three railroad companies owning distinct portions of a continuous road, was held liable for the loss of the baggage of a passenger received at one terminus to be carried over the whole road. The liability was not, however, based alone upon the selling of the ticket and the checking of the baggage. In addition to through tickets, it appeared that under the agreement made each of the railroad companies ran its cars over the whole route, and employed the same agents to sell passage-tickets. Besides these facts, it appeared that the lost baggage had been placed directly in charge of the servants of the defendant company, and that its loss was due in part to the negligence of that company.

Texas & Pacific Rld. Co. v. Fort, a decision by the commission of appeals of the state of Texas, reported in 9 Am. & Eng. Rld. Cases, 392, is also relied on. There it is held that the delivery of through checks upon which were stamped letters indicating the different railways over which the baggage would go, constituted a contract under which the several companies were liable, regardless of the line upon which the loss occurred—a proposition to which we cannot accede. The decision in this case is based upon the ruling in *Hart v. Rail-*

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road Co., supra, which as we have seen, was determined upon other considerations. The same may also be said respecting *Texas & Pacific Railway Co. v. Ferguson*, another decision of the commission of appeals of Texas, 9 Am. & Eng. Rld. Cases, 395, as well as *Hart v. The Grand Era*, 1 Woods C. C. 184.

The only other case relied on is *Wolf v. Central Rld. Co.*, 68 Ga. 653. It was there held that where a passenger with a through ticket over a connecting line checked his baggage at the starting-point through to his destination, and upon arrival there found that it had been injured, he might sue the railroad company which issued the check or the one delivering the baggage in bad order. Upon the facts in that case the court determined that the company selling the tickets was to be regarded as the agent of the other companies composing the line, and intimated that where a passenger travels over a continuous line on a through ticket, and the baggage is sent on a through check, that any one of the companies may be held liable for spoliation of the baggage, irrespective of the point at which it actually occurred; and the query is also raised as to whether they are jointly liable as partners. The writer of the opinion held that by the sale of the tickets and the division of the receipts at periodical settlements, they acted as principals and not as agents, and that by such action they stood substantially in the position of partners in the through business, and were jointly and severally liable as such. The concurrence of the other justices was, however, placed upon the ground that as the last carrier, and the one which was sued, received the baggage in apparent good condition, it was presumably liable, and the chief justice stated that this was the exact point decided. It is difficult in many cases to determine whether the arrangements and agreements of connecting carriers are such as to constitute each of them principals, or to place them in the relation of partners; but neither upon reason nor authority can we hold that the sale of through tickets and the checking of baggage over the connected lines

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of several companies, without other proof of their relations or the basis upon which the business was done, is sufficient to make them jointly and severally liable as partners.

The instructions of the court not being in accord with the views herein expressed, and the evidence being insufficient to support the verdict, the judgment of the district court must therefore be reversed, and the cause remanded for another trial.

All the Justices concurring.

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A.

ACCEPTANCE—SEE "CONTRACT," 8, 9, 10, 11.

ACCOUNT—SEE "PROMISSORY NOTE," 1.

ACKNOWLEDGMENT—SEE "CONVEYANCE," 1, 2, 3.

ACTION:

1. *Railroad Construction; Bond of Contractor.* Where a railroad company takes from the contractor engaged in the construction of its road a good and sufficient bond, such as is required by chapter 136 of the Laws of 1872, it cannot be held liable for the debts due from the contractor for the labor and material which go into the building of such road. The filing of the bond in the office of the register of deeds is not a condition precedent to immunity from such liability. *Mann v. Burt*.... 10
2. *Garnishment; Obligation; Sureties, When Liable.* M. owed \$165 either to A. or to N., and O., in an action against A., claiming that the debt was due to A., garnished M., and the court ordered M. to pay the money into court. N., however, claimed the money as the creditor of M., and M., not knowing to whom he was liable, and wishing to leave the state, entered into an agreement with A. and N. and B. and others, that he should pay the money to B., and that B. should retain the same until the question should be finally decided by a judicial determination whether the money belonged to N., or to A., or to O., and that after such determination B. should pay the money to whom it belonged; and the money was in fact paid to B., and he as principal, and others as sureties, executed to M. and A. and N. an obligation to secure the faithful fulfillment of the agreement; and nothing has transpired since to render B. and his sureties liable to an action on the obligation: *Held*, In an action by N. against the obligors on their obligation, that they are not liable; or, in other words, that the obligors are not liable to N. until it is at least settled that the garnishee is not liable in the garnishment proceedings. *Noble v. Bowman*..... 15
3. *Contract—Party Responsible for Breach.* Where the agent of W. accepts an order from T. to sell to T. a safe in the possession and under the control of L., and the order provides that L. shall deliver the same to T., and the order is subject to the approval of W., and W. afterward approves the same and directs L. to deliver to T. the safe, but L. refuses absolutely to do so, *held*, that T. is not responsible for the refusal or wrong of L., and W. is liable to T. for the damages of the breach of the contract on his part. *Warner v. Thompson*..... 27
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5. *Eaves-Trough, Damage by Water for Want of.* Where two buildings are situated near each other, upon lots adjacent, and the eaves of one come within a few inches of the side or wall of the other, and the owner of such building has no eaves-trough, gutter, or other conductor for carrying off the rain or water falling upon his building, *held*, that an action will lie against him for any damage to the adjoining building, or its contents, caused by the water falling on the roof, and discharged against the wall of such adjoining building, on account of the absence of the proper eaves-trough, gutter, or other conductor to carry off such water. *Hazeltine v. Edgmand*..... 202
6. *Conversion; Measure of Damages.* In an action to recover damages for the seizure and conversion of a stock of merchandise, the plaintiff is entitled to recover the value of the property at the time of conversion, with interest thereafter at the rate of seven per cent. Evidence examined, and held to be sufficient to sustain the verdict. *Simpson v. Alexander*..... 225
7. *Duty of Person Crossing Track.* Where a person is about to cross a railway track it is his duty to use his senses, and if he does not, and by reason thereof injury results to him from a moving railway train, he cannot recover from the railway company. *Clark v. Mo. Pac. Rly. Co*..... 350
8. *Person Personating Another; Indorsement of Draft; Mistake; Liability.* Daniel Guernsey was the owner of a quarter-section of land in Butler county, in this state; he formerly resided in Butler county, but at the time of the transactions hereinafter stated lived in Iowa; an unknown person, assuming the name of Daniel Guernsey, obtained a loan from S. upon the Guernsey land, and executed his notes and mortgages for the loan in the name of Daniel Guernsey; S. sent the amount of the loan by draft by mail to the person executing the notes and mortgages, who said his name was Daniel Guernsey and whose name he then believed to be Daniel Guernsey, and made the draft payable to the order of Daniel Guernsey, intending thereby the person to whom he sent the draft. A bank received this draft for a valuable consideration, in good faith, from the same person to whom it was sent, whom the bank believed to be Daniel Guernsey, and who indorsed the draft by that name. *Held*, Although S. was mistaken and deceived in the transactions, the person he dealt with was the person intended by him as the payee of the draft, designated by the name that he assumed in obtaining the loan, and that his indorsement of it was the indorsement of the payee of the draft by that name; and further *held*, under all the circumstances of this case, as the bank took the draft in good faith and for value, S. cannot recover his loss from the bank. *National Bank v. Shotwell*.... 360
9. *Attorney and Client; Good Faith.* An attorney, when acting for his client, is bound to the most scrupulous good faith. If he corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So, also, if a plaintiff is guilty of so influencing the attorney of the defendant, by the payment of money, without the knowledge or consent of his client, as to make it the interest of said attorney that plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any resistance to the rendition of the

ACTION—CONTINUED:

judgment in favor of the plaintiff, a new action may be sustained by the defendant to set aside the former judgment and open the case for a new and fair hearing. *Haverty v. Haverty*, 438

10. *Specific Performance; Action, Not Maintained.* On June 26, 1884, A. N. Hanna deposited \$50 with the First National Bank of Emporia, Kansas, and received the following instrument in writing, to wit:

"FIRST NATIONAL BANK OF EMPORIA, KANSAS.—Deposited for account of A. N. Hanna, 6—26, 1884, currency \$50, being deposit to apply upon purchase of north half of northwest quarter 34—20—9, Chase county. If Critzer furnishes good and sufficient warranty deed in thirty days, said Hanna is to pay the remaining three hundred and fifty dollars inside thirty days from this date. If Hanna does not so pay, then this money is to be forfeited to Critzer. If Critzer does not furnish said deed in thirty days, then this fifty dollars returned.—A. N. HANNA.

Dep.

Cross.

Title to be passed upon by J. J. Buck, at Hanna's expense.

Dep.

Cross."

Hanna was the agent of M. R. Barker, and Cross was the agent of W. E. Critzer. Critzer owned ten-fourteenths of the above-described land, and the other four-fourteenths belonged to minor heirs, which four-fourteenths Critzer expected to purchase from the guardian of the minor heirs by virtue of proceedings in the probate court; and afterward he did so purchase the same; but he never executed any deed for the property to either Hanna or to Barker, and the fifty dollars have never been returned to Hanna or to Barker. *Held*, That Barker cannot maintain an action to compel Critzer to convey the property to him. *Barker v. Critzer*..... 459

11. *Sheriff's Sale; Agreement to Bid; Sale, Not Set Aside.* Although combinations which might prevent competition at sheriffs' sales are always looked upon by courts with great disfavor, yet where no combination was made except that the several judgment creditors appointed one of their number as agent to attend the sheriff's sale and purchase the property in his own name, and for their benefit, unless it was sold for more than he wished to pay; and there was no agreement, arrangement, or understanding between the judgment creditors that would prevent any one of them, or any other person, from bidding for himself; and the agent appeared at the sale and purchased the property as agreed: *Held*, Under the circumstances of this case, that the aforesaid agreement would not of itself and alone be sufficient to authorize the judgment debtor, more than a year after the sale was made, and several months after it was confirmed, and after the sheriff's deed was executed, and after some of the property had been sold to innocent purchasers, to commence and maintain an action in the nature of a suit in equity to set aside the sheriff's sale. *Capital Bank v. Huntoon*..... 578

12. *Illegal Transaction.* As a general rule, an action which grows out of and is founded upon an illegal transaction where the plaintiff and defendant are in equal guilt, cannot be maintained. *Hinnen v. Newman*..... 709

13. *Fraud; Parties Equally Culpable; No Cause of Action.* N. was employed by the executors of an estate to sell the property of the estate at public auction, and he entered into a secret agreement with H. to attend the sale and purchase certain horses belonging to the estate for him. In pursuance of the agree-

ACTION — CONTINUED:

ment, H. appeared at the sale, and without any notice to those interested in the estate, or to the bystanders, he bid in the horses for N., but in his own name, and paid for them with his own funds. Afterward, the horses came into the possession of N.; and H., claiming the ownership, brings an action of replevin to recover the possession of them. *Held*, That the conduct of the parties in the purchase and sale of the horses, contravenes public policy and is illegal, and that as the plaintiff's right of action is founded solely on the illegal transaction, and as he is equally culpable with the defendant, he must fail. *Id.* 709, 710

See "HOMESTEAD," 1, 6; "JUDGMENT," 4, 6, 11; "MECHANICS' LIEN," 1, 2; "RAILROADS, AND RAILROAD COMPANIES," 3, 4, 5, 11, 29, 41, 42, 43, 44.

ADMINISTRATOR — SEE "MORTGAGE," 6.

ADVERSE POSSESSION — SEE "POSSESSION," 1.

AFFIDAVIT:

Irregularity. Where a tax list and accompanying notice are properly published for the requisite length of time required by the statute, and the printer publishing the list and notice makes an affidavit thereof, as prescribed by § 108 of said chapter 107, and such affidavit is filed with the county clerk, to be preserved by him, the failure or omission of the county treasurer to make another affidavit of the printing of the list and notice, in accordance with the provisions of said § 108, is only an irregularity, and will not affect fatally the tax proceedings. *Stout v. Coates, Assignee* 382

See "CRIMINAL LAW," 20; "ORDER OF ARREST."

AGENCY:

1. *Statute of Frauds; Resulting Trust.* Where a person desiring to purchase a piece of land employs by parol a firm of land agents to negotiate for the purchase of the land for him, and the member of the firm who does the business commences such negotiations, but finally, and in violation of his duties as agent, purchases the property for himself, with his own money, and takes the title thereto in his own name; and afterward the principal tenders to the agent an amount of money equal to the purchase-money, and an additional amount sufficient to compensate the agent for all his services, and also tenders a deed for the land for the agent to execute to the principal, and demands of the agent that he shall execute the same, but the agent refuses, and claims to own the land himself, *held*, under these facts, and by operation of law, that the agent holds the legal title to the land in trust for his principal; that the principal holds the paramount equitable title thereto, and by keeping his tender good may recover the property in an action in the nature of ejectment; and this notwithstanding the statute of frauds, and the fact that the employment of the agent was only in parol, and the further facts that the principal did not advance the purchase-money, and has never been in the possession of the property, nor made any improvements thereon; that the case is not one of the creation of an express trust either by parol or in writing, nor one of the express transfer of any in-

AGENCY—CONTINUED:

- terest in real estate either by parol or in writing, but is simply a case of resulting trust, brought into existence by the operation of law upon the facts of the case; and that the case does not come within the statute of frauds; and that the authority of the agent for the purpose for which he was employed need not be in writing. *Rose v. Hayden*..... 106, 107
2. *Evidence of Authority.* While an agent may testify under oath as to his authority to act for the principal, the mere declarations of one who professes to be an agent are not competent evidence to establish his agency. *French v. Wade*..... 391
3. *Principal, When Bound by Acts of Agent.* A principal is bound for the acts of his agent done within the scope of his authority, and the principal will also be responsible for the unauthorized acts of the agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within and not in excess of the authority conferred on him. *Banks Bros. v. Everest & Waggener*..... 687
4. *Private Instructions, When Inoperative.* Where an agent is held out to the world as one having the authority of a general agent, any private instructions or limitations not communicated to the persons dealing with such agent will not affect them nor relieve the principal from liability where the agent oversteps such limitations. *Id.*..... 687

AGREEMENT—SEE "CONTRACT."

ALIMONY—SEE "DIVORCE."

AMENDMENT OF RETURN—SEE "SHERIFF'S SALE," 1.

ANSWER—SEE "PLEADING AND PRACTION," 7, 25, 31.

APPEAL—SEE "CRIMINAL LAW," 1, 4, 5, 28; "JUDGMENT," 10.

APPORTIONMENT—SEE "TAXES, AND TAXATION," 20.

APPRAISEMENT—SEE "SHERIFF'S SALE," 5, 7, 11.

APPROVAL OF LAWS—SEE "LEGISLATURE," 1, 2, 3.

ARBITRATION:

1. All controversies of a civil nature, including disputes concerning real estate, may be the subject of arbitration. (*Stigers v. Stigers*, 5 Kas. 652, referred to, and disapproved.) *Finley v. Funk*..... 668
2. *Settlement of Dispute—Consideration—Valid Contract.* A dispute had long existed between the plaintiff and defendant in regard to the boundary line running north and south, dividing two contiguous tracts of land which they owned. The defendant claimed that a certain hedge was standing upon the true line, while the plaintiff claimed that it was three rods farther east. A written agreement was finally entered into establishing the boundary on the line claimed by the defendant. As a part of the contract, the defendant agreed to pay the plaintiff for the strip of land lying between the established line and the one claimed by the plaintiff, which was ascertained to be two and one-half acres, the value thereof to be fixed by arbitration.

ARBITRATION—CONTINUED:

Held, In an action on the agreement to recover the value of the land, that the mutual concessions of the parties in fixing the disputed boundary line, and the relinquishment by the plaintiff of his claim to the disputed strip of land, is sufficient consideration to support the defendant's promise to pay the value of the strip, and that the contract is valid, and should be upheld. *Id*..... 668

ARGUMENT—SEE "PRACTICE, DISTRICT COURT," 9.

ARREST AND BAIL—SEE "ORDER OF ARREST."

ASSENT—SEE "CONTRACT," 8, 9, 10, 11.

ASSESSMENT—SEE "TAXES, AND TAXATION," 4, 8.

ASSIGNMENT:

Set-Off, Not Defeated. When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other a set-off could have been set up, neither can be deprived of the benefit of such set-off by the assignment of the other. *Gardner v. Risher*..... 93
See "CONVEYANCE," 4.

ATTACHMENT:

1. *Waiver of Error in Discharging.* Where a suitor brings to the supreme court for review an order of the district judge at chambers, discharging an attachment that had been obtained at his instance, and, after the petition in error is filed, voluntarily releases the attached property and causes it to be delivered to the adverse party, *held*, that he thereby acquiesces in and affirms the order complained of, and waives any error that may have been made in discharging the attachment. *Fenlon v. Goodwin*..... 123
2. *Order not Appealable.* In an action before a justice of the peace an attachment was discharged, and afterward a judgment was rendered in favor of the plaintiff and against the defendant upon the merits, and afterward the plaintiff filed an appeal bond attempting to take an appeal both from the judgment of the justice upon the merits, and from the order of the justice discharging the attachment; and the appeal bond was sufficient for both purposes, if an appeal from an order of a justice of the peace discharging an attachment is allowable under the statutes. In the district court that portion of the appeal which had for its object the giving to the district court power to review and retry the attachment proceedings instituted before the justice of the peace was dismissed. *Held*, Not error; that an order of a justice of the peace discharging an attachment is not appealable. *Roll v. Murray*..... 171
3. *Note in Settlement of Account.* Where a note is accepted in the settlement of an open account and is taken as absolute payment and extinguishment of the former debt, the fraudulent disposition of a part of his property by the debtor several months prior to the execution of the note, but during the existence of the open account, is not a ground for attachment in an action brought to recover upon the promissory note. *Hershfield v. Lowenthal*..... 407

ATTORNEY AT LAW:

1. *Authority; Presumption.* An attorney at law and banker, having claims in his hands for collection, will, where it is necessary to secure the collection of such claims, presumptively have authority to take as collateral security and in his own name a promissory note secured by a chattel mortgage. *Dolan, Sheriff, v. Van Demark*..... 804
2. *Attorney's Lien—Notice.* Where an attorney, who is a member of a law firm composed of three persons, receives from a railway company a draft to deliver to a third person in the settlement of a law suit, and in such suit none of the members of the firm represented the railway company, or had anything to do with the case, a notice of an attorney's lien served upon the members of the firm, other than the one who actually received the draft, will not be notice upon the attorney receiving the draft, or make such attorney receiving the draft chargeable with negligence in delivering the draft according to his instructions, before the attorney serving notice of his lien has been paid or satisfied. *St. L. & S. F. Rly. Co. v. Bennett*..... 895
3. *Good Faith.* An attorney, when acting for his client, is bound to the most scrupulous good faith. If he corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So, also, if a plaintiff is guilty of so influencing the attorney of the defendant, by the payment of money, without the knowledge or consent of his client, as to make it the interest of said attorney that plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any resistance to the rendition of the judgment in favor of the plaintiff, a new action may be sustained by the defendant to set aside the former judgment and open the case for a new and fair hearing. *Haverty v. Haverty*..... 438

ATTORNEY AND CLIENT—SEE "ATTORNEY AT LAW," 3.

ATTORNEY'S FEES—SEE "PARTITION,"

ATTORNEY'S LIEN—SEE "ATTORNEY AT LAW," 2; "NOTICE," 2.

AUTHORITY—SEE "AGENCY," 2, 3, 4; "EVIDENCE," 11; "PRESUMPTION," 2.

AVOIDANCE OF DANGER—SEE "PRESUMPTION," 1.

B.

BAGGAGE—SEE "RAILROADS, AND RAILROAD COMPANIES," 41, 42, 43, 44.

BAIL—SEE "ORDER OF ARREST."

BANK:

Powers Vested in Directors as a Board. The only powers conferred by statute upon the directors of a national bank are vested in them as a board, and when acting as a unit, and therefore the assent of a majority of the individual members of the board acting separately and singly is not the assent of the bank, and is not binding upon it. *National Bank v. Drake*, 564

BIGAMY—SEE "CRIMINAL LAW," 35, 36, 37, 38.

BOARDING PRISONERS—SEE "COUNTIES, AND COUNTY OFFICERS," 4.

BOND OF CONTRACTOR—SEE "BRIDGE," 3; "RAILROADS, AND RAILROAD COMPANIES," 1, 2, 3, 4.

BONDS—SEE "RAILROADS, AND RAILROAD COMPANIES," 6, 7, 14, 17, 18.

BOUNDARIES—SEE "EVIDENCE," 16.

BREACH OF CONTRACT—SEE "CONTRACT," 3, 15, 17, 18.

BRIDGE:

1. *Authority of County Board.* The board of county commissioners of Wyandotte county appropriated \$980 to assist in the building of the Riverview bridge—a bridge across the Kansas river between the cities of Wyandotte and Kansas City, in this state, and connecting two public thoroughfares of the county. *Held*, That the board has the authority to make the contract and pay therefor according to its terms, although the contract only provided for the building or finishing of a portion of the bridge, if, with the assistance thus rendered by the board, the bridge becomes a completed structure fit for use. *Kansas City Bridge and Iron Co. v. Comm'rs of Wyandotte Co.* 557
2. *Substantial Compliance with Statute.* A notice published by the board of county commissioners in the official paper of their county, of their intention to appropriate money to build a bridge, thirty days prior to the time fixed for the regular meeting of the board, specifying the place where such bridge is proposed to be built, and the estimated cost thereof, is a substantial compliance with the provisions of § 2, ch. 64, Laws of 1876—§ 398, ch. 25, Comp. Laws of 1879. *Id.* 557
3. *Bond of Contractor, When Not Invalidated.* Where the person to whom a contract is awarded for the building of a bridge, under the terms of the act providing for building and repairing bridges in counties having twenty thousand inhabitants or more, at the time of the execution of the contract, gives a bond with good and sufficient sureties, payable to the county, and recites thereafter "and the state of Kansas," and such bond does not upon its face show that it is "for the benefit of the bridge fund," *held*, that such alleged defects cannot vitiate or invalidate the bond so as to defeat the payment for the bridge after its construction and acceptance according to the terms of the contract. *Id.* 557

BURDEN OF PROOF—SEE "PLEADING AND PRACTICE," 21, 30, 31.

C.

CARE AND DILIGENCE—SEE "NEGLIGENCE;" "RAILROADS, AND RAILROAD COMPANIES," 5, 9, 11, 20, 21, 22, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 38, 41, 42, 43, 44.

CASE-MADE—SEE "PRACTICE, SUPREME COURT," 1, 2, 3.

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CHALLENGE TO ARRAY—SEE "JURY," 2.

CHANGE OF VENUE—SEE "PRACTICE, DISTRICT COURT," 1, 2, 3.

CHARGE OF COURT—SEE "INSTRUCTIONS."

CHARTER—SEE "CORPORATIONS."

CHATTEL MORTGAGE:

1. *Validity; Possession.* Where a mortgagee of chattels takes possession of the same under the terms of the mortgage and with the consent of the mortgagor, the mortgage will be held valid, although it may never have been filed in the office of the register of deeds, and although the description of the property in the mortgage may be slightly defective; and *held*, in the present case, that there was sufficient evidence to sustain the finding made by the trial court that the mortgagee took the actual possession of the mortgaged property under the mortgage. *Dolan, Sheriff, v. Van Demark*..... 305
2. *Pleading; Damages.* In an action of replevin brought by a mortgagee of chattels, where the property remains in the hands of the defendant, and is sold by the defendant for more than the plaintiff's claim, with interest, and judgment is rendered in favor of the plaintiff, but only for his damages, and not for a return of the property, *held*, that he may recover as his damages the amount of his claim, with interest, although the petition was only an ordinary petition in replevin. *Id.*..... 305

See "DAMAGES," 8.

CITIES:

1. *Street Railroad; Regulation by City; License Tax.* A city granted to a corporation a franchise to construct and operate a street railroad within its limits, and in the ordinance conferring the grant provided how and when it should be constructed, and the manner in which it should be maintained. *Held*, That the grant thus made will not exempt the corporation from reasonable regulation by the city in the operation of the road, nor will it prevent the city from levying and collecting a license tax thereon. *City of Wyandotte v. Corrigan*..... 21
2. *Grants to Corporations; Strict Construction.* Grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public. *Id.*..... 21
3. *Agent Violating City Ordinance.* An agent or employé of such corporation who knowingly operates or assists in operating a street railway when the license tax imposed on such business is unpaid, will be liable to prosecution and punishment, as prescribed by the ordinance. *Id.*..... 21
4. *Tie Vote in Council.* The mayor of a city of the second class is authorized to give a casting vote upon the confirmation of an officer appointed by him, where the council is equally divided on the question. *Carroll v. Wall*..... 36
5. *City, When Liable for Negligence.* Where a person passing along the sidewalk of a much-traveled street in a city of the first class is injured by the falling of a bill or show-board, blown down by a strong wind, which bill or show-board was negligently and imperfectly constructed on private property, but was partly supported by studding or uprights nailed to the sidewalk, and was so near to and adjoining the sidewalk as to be dangerously contiguous thereto, and the officers of the city knew, before the falling of the bill or show-board, that it was not put up in a safe and proper manner, and that it was so insecure as to endanger persons passing on the street, *held*, the city will be liable in damages therefor, if the person so injured used ordinary care and prudence to avoid the danger. *Langan v. City of Atchison*.... 318
6. *Defective Sidewalk—Use—Care Required.* A person is not to be entirely debarred from the use of a street because he may know it is defective or somewhat dangerous; but to be entitled to recover for the injury sustained by him by reason of the defective or dangerous condition of the street, he must have used ordinary care and prudence to avoid the danger. *Id.*..... 318
7. *Contributory Negligence; Recovery.* Upon examination of the evidence in the record, *held*, that it cannot be said, as a matter of law, that the plaintiff was guilty of such contributory negligence as to bar any recovery. *Id.*..... 318
8. *Valid Statute.* Section 2, chapter 95 of the Laws of 1885, attempting to cure irregularities in the construction of sewers in cities of the first class, is constitutional and valid. *Mason v. Spencer, County Clerk*..... 512
9. *Curative Statute.* Where an irregularity rendering an act of a city or subordinate agency illegal or void is simply a failure to comply with some provision of the statutes, the compliance with

CITIES — CONTINUED:

- which the legislature might in advance have dispensed with, the legislature can, by a general curative statute subsequently passed, dispense with such compliance and thereby render the act of the city or subordinate agency legal and valid. *Id.*.... 512
10. *Sewer Taxes; Apportionment.* Where sewer taxes in a city are levied in accordance with the value of the lots without the improvements thereon. *held*, that such rule of apportionment of the taxes is valid. *Id.*..... 512
 11. *Boundaries, General Reputation to Prove.* Where the identity and boundaries of city lots cannot be determined by the recorded plat, nor from any monuments on the ground, general reputation may be received to establish them, in the absence of evidence of a higher and better nature. *Stetson v. Freeman*.... 523
 12. *Injunction, When Not a Matter of Right.* The owner of a lot in a city is not entitled, as a matter of right, to an injunction against a party from obstructing a sidewalk or street in such city, where the owner's lot or land does not abut upon and is not opposite or contiguous to the obstruction, since the injury or nuisance complained of is not different in kind from that sustained by the public. *Billard v. Erhart*..... 611
 13. The word "section," used in paragraph or subdivision 34 of § 11, article 3, chapter 37, Laws of 1881, is to be construed as meaning "subdivision, or subsection." *In re Dassler, Petitioner*.... 678
 14. *Road Levies, Not Debts.* Road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract. *Id.*..... 678
 15. *Road Work, Not Involuntary Servitude.* The performance of work upon an assessment or levy payable in labor for the repair of roads or streets, is not that kind of involuntary servitude intended to be embraced within the provisions of the constitution of the state, or of the United States. *Id.*..... 678
 16. *Street Labor, Not a Tax on Right to Vote.* The satisfaction of an assessment or levy of labor to keep the streets in repair in cities of the first class, is not a prerequisite of registration, and in no sense can it be said that said assessment or levy is a tax, or an embargo upon the right to vote, although the list of registration is one of the methods of ascertaining who are liable to work upon the streets. *Id.*..... 678
 17. *Road District; Later Statute Controls.* Where the legislature has by the passage of a later statute constituted each city of the first class a separate road district, and given such cities full control over the labor to be performed upon its streets, and authorized ordinances to be enacted to enforce the same, the later statute is controlling, as it is a substitute for the prior statute, so far as it conflicts therewith. *Id.*..... 678

CITY JAIL — SEE "CRIMINAL LAW," 29.

CITY ORDINANCE — SEE "CITIES," 1, 3, 17.

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COMBINATION OF JUDGMENT CREDITORS—SEE "SHERIFF'S SALE," 2, 4.

COMMON CARRIER—SEE "RAILROADS, AND RAILROAD COMPANIES," 9, 10, 11, 12, 13, 24, 41, 42, 43, 44.

COMMON LAW:

1. A section foreman or section boss in the employment of a railroad company is not a coëmployé or fellow-servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of that rule of the common law which exempts the master from liability for negligence between coëmployés or fellow-servants. *St. L. & S. F. Ry. Co. v. Weaver*, 412

COMMON LAW—CONTINUED:

2. *Judicial Notice of.* The courts of this state may take judicial notice of the common law of Kansas, and what it would be except for our own statutes and our own written law; and for this purpose the courts of this state may take judicial notice of all the judicial decisions in this country and in all other countries which have adopted the common law of England; but for the purpose that the courts of this state shall know as a fact in a particular case what the common law of some other state is, such law must be proved as any other fact. *Id.* . . . 412, 413
3. *Common Law, When to Govern; Presumption.* Where a cause of action involves as a question of fact what the common law of some other state is, it will be held that the common law of such other state is the same as that of Kansas, unless it is shown by the evidence to be otherwise; and when it is shown by the evidence to be otherwise, it will govern as it is thus shown to be. *Id.* . . . 413

COMMUNITY OF INTEREST—SEE “RAILROADS, AND RAILROAD COMPANIES,” 44.

COMPLAINT:

Public Offense, Charged. A criminal complaint filed in a justice's court, charging among other things that the defendant, certain articles “of the goods and chattels of one M. [who is not the defendant], then lately before feloniously stolen, taken and carried away, unlawfully and feloniously did buy and receive,” “contrary to the statute in such case made and provided,” charges a public offense, although it may not in express terms, but only impliedly, charge that the property was “stolen from another” than the defendant. *The State v. McLaughlin.* . . . 650

COMPROMISE—SEE “ARBITRATION.”

CONDUCTOR—SEE “RAILROADS, AND RAILROAD COMPANIES,” 9, 10, 11.

CONFESSION OF JUDGMENT—SEE “JUSTICES, AND JUSTICES' COURTS,” 3.

CONNECTING LINES—SEE “RAILROADS, AND RAILROAD COMPANIES,” 41, 42, 43, 44.

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CONSTITUTION OF KANSAS, CITED:

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§ 10—defendant may demand the nature and cause of accusation against him.	276
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Art. 3, § 11—election of judicial officers.	816, 817
Art. 12, § 1—no special act to confer corporate powers.	264, 518

CONSTITUTIONAL LAW:

1. Chapter 131 of the Laws of 1885 is not unconstitutional, or void. *Endowment and Benevolent Association v. The State*. 512
2. *Valid Statute*. Section 2, chapter 95 of the Laws of 1885, attempting to cure irregularities in the construction of sewers in cities of the first class, is constitutional and valid. *Mason v. Spencer, County Clerk*. 512
3. *Title to Act; Valid Statute*. The title to an act of the legislature reads as follows: "An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings in said counties." The "subject" of this act is the creation and use of a fund to build county buildings, and the body of the act expressly applies to the three counties of Ottawa, Washington, and Republic. *Held*, That the act contains only one subject, which is sufficiently expressed in its title, and is therefore not in conflict with that provision of § 16, article 2 of the constitution which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title." *Weyand v. Stover, Treas*. 545, 546
4. *Reading Bills; Emergency; Journal*. The bill was introduced in the senate and read a first and a second time on the same day, and the senate journal does not show whether a case of emergency existed, or not. *Held*, That, although it is necessary under § 15, article 2 of the constitution that "every bill shall be read on three separate days in each house, unless in case of emergency," yet that each house is the exclusive judge as to when a case of emergency arises or exists; and it is not necessary, in order that the reading of the bill shall be considered valid, that the emergency shall be stated upon the journal. *Id*. 546
5. *Road Levies, Not Debts*. Road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract. *In re Dassler, Petitioner*. 678
6. *Road Work, Not Involuntary Servitude*. The performance of work upon an assessment or levy payable in labor for the repair of roads or streets, is not that kind of involuntary servitude intended to be embraced within the provisions of the constitution of the state, or of the United States. *Id*. 678

CONTEST OF ELECTION—SEE "ELECTION," 2, 3, 4, 5.

CONTINUANCE—SEE "JUSTICES, AND JUSTICES' COURTS," 1.

CONTRACT:

1. *Teamster and Team—Company not Chargeable*. Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable. *Mann v. Burt*. 10
2. *Construction by Court*. Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court. *Warner v. Thompson*. 27

CONTRACT — CONTINUED:

3. *Party Responsible for Breach.* Where the agent of W. accepts an order from T. to sell to T. a safe in the possession and under the control of L., and the order provides that L. shall deliver the same to T., and the order is subject to the approval of W., and W. afterward approves the same and directs L. to deliver to T. the safe, but L. refuses absolutely to do so, *held*, that T. is not responsible for the refusal or wrong of L., and W. is liable to T. for the damages of the breach of the contract on his part. *Id.*..... 27
4. *Specific Performance—When Enforced, When Not.* A contract will be specifically enforced only where its specific enforcement is equitable; and generally, only where the plaintiff has in equity and good conscience a right to demand its specific enforcement; and generally, where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced. *Bird v. Logan.*..... 228
5. *Life Insurance—Endowments—Benefits.* A contract by an association to pay at certain stated periods of time certain sums of money as endowments to living members, or in case of their death to pay certain other sums of money as benefits to their beneficiaries, is life insurance both as to the endowments and the benefits. *Endowment and Benevolent Association v. The State.*..... 258
6. *Physician Employed without Authority.* Where a railway passenger train is derailed and some of the passengers are injured by inevitable accident, no obligation rests upon the company to furnish medical care and attention to the injured passengers, and the company cannot be made liable for such care and attention, by the contract of the division superintendent, unless authority has been given him to commit it to such liability; and where a division superintendent employs a physician to attend upon passengers so injured, and the company denies his authority and contests its liability under the employment, it is error for the court to instruct the jury that the division superintendent will be presumed to have such authority until the contrary appears. *U. P. Rly. Co. v. Beatty.*..... 265
7. An allegation that the "plaintiff contracted with the defendant to cut and bind wheat for the defendant," is not an allegation that the plaintiff contracted with the defendant to cut and bind all the wheat which the defendant owned. *Ingraham v. Morris,* 290
8. *Acceptance; Time.* Where a proposition to enter into a contract is made, and no time of acceptance is fixed by the party proposing, it must be accepted within a reasonable time. *Trounstine & Co. v. Sellers.*..... 447
9. *Proposition by Letter; Prompt Reply.* Where a proposition to sell a stock of merchandise is made to a distant party by letter, in which he asks for an early response, the proposer has a right to expect a prompt reply through the mail, which is the usual mode of accepting an offer made by letter, or else by some other equally expeditious means. *Id.*..... 447
10. A mere uncommunicated purpose to accept an offer does not constitute an acceptance, and where parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is not of

CONTRACT—CONTINUED:

- itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing. *Id.*..... 447, 448
11. *No Acceptance.* The mere determination to accept an offer received by letter, and the act of the party to whom it is made in starting on a journey with the intention of meeting the proposer and accepting the offer, where no notice of his intention is sent to or received by the proposer within a reasonable time, is no more than a mere mental assent, and does not amount to an acceptance. *Id.*..... 448
12. *Part Payment; Creditor not Estopped by Receipt.* The payment of a portion of an ascertained, overdue, and undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance; and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt. *St. L. Ft. S. & W. Rld. Co. v. Davis.*..... 464
13. *Express Agreement.* Before the acceptance by the creditor of an amount less than is claimed will operate as a settlement or satisfaction of the entire debt, it must have been accepted on an express agreement to that effect. *Id.*..... 464
14. *Receipt as Evidence.* A receipt is only *prima facie* evidence of the admissions which it contains, and where it does not embody a contract it is open to explanation, and the party admitting payment in full may show it to be untrue. *Id.*..... 464
15. *Burden of Proof on Defendant.* In an action brought to recover damages for breach of a written contract to deliver good merchantable corn, the plaintiff alleged and proved, and the defendant admitted, the payment of the money under the contract, and the non-delivery of the corn; the answer stated a tender of the amount and quality of the corn contracted for, and the plaintiff's refusal to accept it; the reply denied that any corn of the quality contracted for was tendered, and further alleged that the corn tendered by the defendant was light and damaged. *Held,* That the burden was upon the defendant to prove that the corn tendered by him was good merchantable corn, as he asserted the affirmative in his answer, that a tender of such corn had been made. *Bates v. Lyman.*..... 648
16. *Settlement of Dispute—Consideration—Valid Contract.* A dispute had long existed between the plaintiff and defendant in regard to the boundary line running north and south, dividing two contiguous tracts of land which they owned. The defendant claimed that a certain hedge was standing upon the true line, while the plaintiff claimed that it was three rods farther east. A written agreement was finally entered into establishing the boundary on the line claimed by the defendant. As a part of the contract, the defendant agreed to pay the plaintiff for the strip of land lying between the established line and the one claimed by the plaintiff, which was ascertained to be two and one-half acres, the value thereof to be fixed by arbitration. *Held.* In an action on the agreement to recover the value of the land, that the mutual concessions of the parties in fixing the dis-

CONTRACT — CONTINUED:

- puted boundary line, and the relinquishment by the plaintiff of his claim to the disputed strip of land, is sufficient consideration to support the defendant's promise to pay the value of the strip, and that the contract is valid, and should be upheld. *Finley v. Funk*. 668
17. *Sum Named, a Penalty.* Where H. sells his business and goodwill to G., and as a part of the same transaction executes a written instrument in which he says: "I, —, bind myself in the sum of \$500" that I will not engage in such business at the same place for the period of five years, *held*, that the sum named in the instrument is a penalty, and not liquidated damages; and for a breach of the agreement by H., G. may recover only his actual damages. *Heatwole v. Gorrell*. 692
18. *Fixed Sum, When a Penalty, and not Liquidated Damages.* Whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that may occur, or the amount of the damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages. *Id.*. 692, 698
- See "ACTION," 8; "CHATTEL MORTGAGE," 1; "HOMESTEAD," 6; "RAILROADS, AND RAILROAD COMPANIES," 41.

CONVEYANCE:

1. Where a notary public takes the acknowledgment of a deed in this state, he should authenticate the same with his notarial seal. *Meskimen v. Day*. 46
2. *Deed, When Entitled to Record.* Before a deed acknowledged in this state is entitled to be recorded, it must be proved or acknowledged and certified as prescribed by the statute. *Id.*. 46
3. *Deed, Without Notarial Seal.* The record of a deed filed in the office of a register of deeds May 21, 1883, acknowledged before a notary public in this state, but not authenticated with his notarial seal, cannot be received in evidence under the provisions of § 12, ch. 87, Laws of 1870; § 387a, Code, Comp. Laws of 1879. *Id.*. 46
4. *General Assignment; Mistake; Notice; Tax Sale; Possession.* One P., residing in Indiana, was the owner of certain lots in the city of Topeka, in this state. Under the laws of Indiana, he executed a deed of assignment of certain real and personal property to one B., in trust for his creditors. He intended to convey thereby all of his real and personal property, and among other real estate, the lots owned by him in Topeka, but by mistake of the scrivener who prepared the deed, other lots in the city of Topeka, to which P. had no title, were inserted, and the lots intended to be conveyed were wholly omitted therefrom. The property transferred by P. to his assignee failed to pay the debts of his creditors, only fifty cents being realized by them on the dollar. Subsequently, P. conveyed the lots in Topeka, the title to which was in his name, to R., by quitclaim deed. Prior to this conveyance the deed of assignment had never been recorded in the office of the register of deeds of Shawnee county, in this state, nor any steps taken to correct

CONVEYANCE—CONTINUED:

the misdescription in the deed, or subject the lots to the possession of P.'s assignee. R. had no actual notice of the deed of assignment before his purchase. *Held*, That as between R. and one H., in possession of the lots under a tax deed founded upon an invalid tax sale, that R., as the holder of the legal title to the premises, is entitled to possession thereof, subject to H.'s lien for taxes, interest, and costs, and his rights as an occupying claimant. *Hentig v. Redden*. 471
See "HOMESTEAD," 3, 6; "MORTGAGE."

CONTRIBUTORY NEGLIGENCE—SEE "NEGLIGENCE."

CONSTRUCTION OF CONTRACT—SEE "CONTRACT," 2.

CONVERSION—SEE "DAMAGES," 6, 7.

CONVICTION—SEE "CRIMINAL LAW," 6, 17, 25.

CORPORATIONS:

1. *Charter—Copy as Evidence.* A copy of the charter of a corporation created under the laws of this state, duly certified by the secretary of state, under the seal of the state, is evidence of the creation of such corporation. *Mining Co. v. Adams*. 193
2. *Questioning Existence.* In an action by a mining company against a subscriber of stock for installments upon his subscription for stock of the corporation, such subscriber or stockholder cannot, in a collateral way, question the existence of the corporation, or the regularity of its organization. *Id*. 193
3. *Powers.* A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operations in other states and countries, so long as it does not depart from the terms of the charter under which it was created. *A. T. & S. F. Rld. Co. v. Fletcher*. 236
4. *Additional Powers.* Additional powers, auxiliary to the original design or purpose of a corporation, may be conferred thereon by the legislature of the state where the corporation is created. *Id*. 236
See "CITIES," 1, 2; "INSURANCE," 1, 2; "RAILROADS, AND RAILROAD COMPANIES," 12, 13, 14, 15, 16, 17, 18, 32, 38, 41, 42, 43, 44.

CORRECTION OF DOCKET—SEE "JUSTICES, AND JUSTICES' COURTS," 1.

COSTS:

In an action for the recovery of twenty-six acres of real property, in which judgment is rendered in favor of the plaintiff for two acres thereof, the plaintiff is entitled to recover all his costs. *Meskimen v. Day*. 46
See "PARTITION;" "PLEADING AND PRACTICE," 4, 15.

COUNTIES, AND COUNTY OFFICERS:

1. *Railroad—Petition to Vote Aid; Duty of County Board.* Where a petition is properly presented to the board of county commissioners of a county, under the provisions of chapter 107, Laws of 1876, and the amendments thereto, to submit to the qualified

COUNTIES, AND COUNTY OFFICERS — CONTINUED:

- voters of a township a proposition to subscribe to the capital stock of a railroad company proposing to construct a railroad through or into the township, and upon being examined and canvassed by the county commissioners is found to contain the requisite number of legal petitioners, it is the duty of the commissioners to cause an election to be held, as prayed for, to determine whether such subscription shall be made. *The State, ex rel., v. Comm'rs of Rush Co.*..... 150, 151
2. *Limitation of Amount.* Chapter 90, Laws of 1870, does not control or limit the amount of bonds to be voted for under elections granted in accordance with the provisions of chapter 107, Laws of 1876, and the amendments thereto. *Id.*..... 151
3. *Probate Judge—No Forfeiture of Office.* The duties imposed upon a probate judge by the provisions of § 3, chapter 8, Special Session Laws of 1874, concerning the examination and counting of the funds in the hands of a county treasurer, are distinct from the duties pertaining to the judicial office, and are somewhat in the nature of a new office. Therefore the right of a probate judge to enjoy the powers and emoluments of his office as probate judge does not depend upon a faithful discharge of the duties so imposed by said statute; and if he fails or neglects to make the examination and count required by the statute, he does not thereby forfeit his office as probate judge. *The State, ex rel., v. Brown, Probate Judge.*..... 167
4. *Boarding Prisoners.* The duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff, and to him alone is the county liable for the same. *Hendricks v. Comm'rs of Chautauqua Co.*... 483
5. *Medical Services for Prisoners; Liability of County.* Under § 331 of the criminal code the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board. *Id.*... 483
6. *Bridge, Appropriation for; Authority of County Board.* The board of county commissioners of Wyandotte county appropriated \$980 to assist in the building of the Riverview bridge—a bridge across the Kansas river between the cities of Wyandotte and Kansas City, in this state, and connecting two public thoroughfares of the county. *Held*, That the board has the authority to make the contract and pay therefor according to its terms, although the contract only provided for the building or finishing of a portion of the bridge, if, with the assistance thus rendered by the board, the bridge becomes a completed structure fit for use. *Kansas City Bridge and Iron Co. v. Comm'rs of Wyandotte Co.*..... 557
7. *Notice—Substantial Compliance with Statute.* A notice published by the board of county commissioners in the official paper of their county, of their intention to appropriate money to build a bridge, thirty days prior to the time for the regular meeting of the board, specifying the place where such bridge is proposed to be built, and the estimated cost thereof, is a substantial compliance with the provisions of § 2, ch. 64, Laws of 1876—§ 898, ch. 25, Comp. Laws of 1879. *Id.*..... 557

COUNTIES, AND COUNTY OFFICERS—CONTINUED:

8. *Bond of Contractor, When Not Invalidated.* Where the person to whom a contract is awarded for the building of a bridge, under the terms of the act providing for building and repairing bridges in counties having twenty thousand inhabitants or more, at the time of the execution of the contract gives a bond with good and sufficient sureties, payable to the county, and recites thereafter "and the state of Kansas," and such bond does not upon its face show that it is "for the benefit of the bridge fund," *held*, that such alleged defects cannot vitiate or invalidate the bond so as to defeat the payment for the bridge after its construction and acceptance according to the terms of the contract. *Id.*..... 557

COUNTY BOARD—SEE "TAXES, AND TAXATION," 8.

COUNTY-SEAT ELECTION—SEE "ELECTION," 3, 4, 5.

COUNTY TREASURER—SEE "COUNTIES, AND COUNTY OFFICERS," 3.

COURTS:

1. Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court. *Warner v. Thompson*..... 27
2. *Case—Removal to Federal Court.* A case cannot be removed from a state court to the federal courts under the act of congress of March 3, 1875, after a hearing has been had in the state court on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action. *St. L. & S. F. Rly. Co. v. Weaver*..... 412
3. *Common Law, Judicial Notice of.* The courts of this state may take judicial notice of the common law of Kansas, and what it would be except for our own statutes and our own written law; and for this purpose the courts of this state may take judicial notice of all the judicial decisions in this country and in all other countries which have adopted the common law of England; but for the purpose that the courts of this state shall know as a fact in a particular case what the common law of some other state is, such law must be proved as any other fact. *Id.*..... 412. 418
See "PLEADING AND PRACTICE;" "PRACTICE, DISTRICT COURT;" "PRACTICE, SUPREME COURT."

CRIMINAL LAW:

1. *Reversal of Judgment, Various Grounds Alleged for; No Material Error.* Where the defendants in a criminal prosecution appeal to the supreme court and ask for a reversal of the judgment of the court below for incompetency of their own counsel; neglect and failure on the part of the court below to protect their rights and interests; incompetency of the evidence against them; leading questions; erroneous and misleading instructions; insufficiency of the evidence for conviction, it being in part the evidence of an accomplice; the alleged hearing of a motion for a new trial in the absence of the defendants; and the refusal to grant a new trial on the ground of alleged newly-discovered evidence, *held*, under the circumstances of the case, that no material error was committed by the court below, and that the judgment cannot be reversed. *The State v. Holden*..... 31

CRIMINAL LAW--CONTINUED:

2. *Habeas Corpus.* Where a prisoner is held to answer for a criminal offense, and the district court refuses to grant his application for discharge, made by him under the terms of § 221 of the criminal code, and instead thereof remands him to jail until bail is given, the order of the court cannot be reviewed or reversed, or the prisoner discharged, by a proceeding in *habeas corpus* before the supreme court. *In re Edwards, Petitioner* . . . 99

3. *Discharge of Defendant—No Error in Denying Motion.* Where an information was filed against E. for the offense of murder, one day prior to the commencement of the regular term of the district court for 1885, and at such May term of the court, against the objection of the state and the defendant, the court attempted to remove the case for trial to another county, in another judicial district, upon the ground that the judge was disqualified to preside, on account of his prejudice, and such defendant was held to answer on bail to the district court of such other county, and thereafter the September and November terms of the district court where the information was filed were held, without the defendant being tried, and in December the jury were discharged, in his absence, but while his attorneys were present, who refused to appear or answer in any way for him, and the defendant did not at any one of the terms of said court ask or announce himself ready for trial, but made application on the last day of the November term of the court for his discharge, because he had not been brought to trial within the time limited in § 221 of the criminal code, *held*, that the court committed no error in denying the motion, as the state announced itself ready to proceed at once with the trial, and the court decided that there was not time, during the remainder of the term of court, for the trial of the case upon its merits. *Id* . . . 99

4. *Appeal, When.* An appeal in a criminal action can be taken by a defendant only after judgment, and an intermediate order of which he complains can be reviewed only on such an appeal. *The State v. Edwards* . . . 105

5. *No Appeal, When.* An appeal will not lie from an order of the district court refusing an application of a defendant charged with a criminal offense, for his discharge, under the provisions of § 221 of the criminal code, where the court remands the defendant into custody until he gives bail and continues the case against him for trial at the next regular term. *Id* . . . 105

6. *Prohibitory Law; Statements of Witnesses; Limit of Conviction.* Where a county attorney, acting by virtue of the provisions of § 8, chapter 149, Laws of 1885, commonly called the prohibitory liquor law, examines various witnesses, who give their testimony before him, which is reduced to writing and sworn to by them and filed with the information charging the defendant with violations of said chapter 149, and the information so filed is verified by the county attorney on information and belief only, and the names of the witnesses so examined are indorsed upon the information, *held*, that the defendant cannot be convicted of any violations of said act not therein referred to or set forth; and further *held*, that in this case the information and the sworn statements filed with it disclose with great particularity the nature and cause of the accusation made against the defendant. *The State v. Whisner* . . . 271

CRIMINAL LAW—CONTINUED:

7. *Due Process of Law.* The phrase "due process of law" means law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights. *Id.* 271
8. *Proceeding, by Due Process of Law.* Where a defendant is charged in an information filed against him in the district court with violations of the prohibitory liquor law of the state, and there is filed with the information the sworn statements of several witnesses, whose names are indorsed upon the information, tending to describe and set forth with greater certainty and precision the offenses charged in the information, and the defendant is allowed to appear in the court and defend by counsel, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and is given a speedy public trial, by an impartial jury of the county in which the offenses are alleged to have been committed, the proceeding against him is clearly by "due process of law." *Id.* 271
9. *Statements of Witnesses; Complaint Without Cause.* Where the county attorney files with the information the sworn statements of witnesses disclosing the fact that the defendant has committed offenses against the provisions of the prohibitory liquor law, the defendant, upon the trial, has no right to complain that the witnesses making said statements were required to appear by subpoena before the county attorney and give their testimony. As to such matter, the defendant stands before the court as if the witnesses had voluntarily appeared and made their statements before the county attorney concerning their knowledge of the offenses he has committed against the provisions of said act. *Id.* 271
10. *Information; Sufficient Verification.* Where the affidavit annexed to an information charging the defendant with violations of the prohibitory liquor law is verified by the county attorney "to the best of his information and belief," and the sworn statements of witnesses are filed by the county attorney with the information, disclosing the fact that offenses have been committed by the defendant against the provisions of said act, as charged in the information, *held*, that the verification sufficiently complies with the requirement of the statute. *Id.* 272
11. *Challenge to Array.* Where twenty-six persons are summoned to appear as the regular panel of petit jurors, and it is affirmatively shown on the part of the defendant on trial for a misdemeanor that two or three of the panel are not eligible to be returned on the jury list, *held*, that the court has ample power to purge the jury without sustaining a challenge to the array; and *held*, further, that in such a case there has not been such a palpable disregard of the statute in selecting and drawing the regular panel of jurors as to require a challenge to the array to be sustained. *Id.* 272
12. *Murder—Verdict, Sustained.* The defendant, who was charged with murder, admitted that he shot and killed the deceased, but claimed that the act was justifiable. Upon an examination of the evidence given on the trial, it is held to be sufficient to sustain a verdict of murder in the second degree. *The State v. Miller* 328

CRIMINAL LAW—CONTINUED:

13. *Testimony Given by Defendant.* The testimony given by the defendant on his preliminary examination, and which is reduced to writing and signed by him, may, when properly identified, be offered in evidence by the state against him. *Id.* ... 328
14. *Conspiracy Sufficiently Shown.* Ordinarily, a conspiracy should be established *prima facie* before the acts and declarations of one co-conspirator can be given in evidence against another; and in this case it is held that the conspiracy was sufficiently shown to warrant the admission in evidence of the acts and declarations of those who were charged with aiding and abetting the defendant in the commission of the offense. *Id.* 328
15. *Witness—Changing Testimony.* When the witness admits that the testimony which she formerly gave in the case was untrue, and then proceeds to state what she claims is a correct relation of the facts, full inquiry should be allowed with respect to what led her to make the so-called untrue statements, as well as the influences which subsequently caused her to change her testimony; but where such witness has quite fully stated what was said and done by those who were urging her to return to the witness stand and tell the truth, the refusal of the question as to what she was crying about in their presence, is not such an error as will work a reversal of the judgment. *Id.* 328
16. Charge of court, how considered. *Id.* 329
17. *New Trial; Former Conviction, No Bar.* When the defendant, charged with murder, was convicted of manslaughter in the fourth degree, and thereupon moved for and obtained a new trial, he thereby placed himself in the same position as if no trial had been had, and the conviction for manslaughter in the fourth degree was no bar to a subsequent conviction of a higher degree of the offense charged. *Id.* 329
18. *Jury; Conduct.* The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial when it is not shown that the jurors read any part of what was written in such transcript. *Id.* 329
19. *Forgery; Instrument Good on its Face; Extrinsic Evidence.* A false instrument or writing, made out with criminal intent to defraud, which is good on its face, may be legally capable of effecting the fraud, even though inquiry into extrinsic facts or matters not appearing on its face would show it to be invalid, even if it were genuine; therefore, the forging of such an instrument or writing is an offense under the statute. *The State v. Hilton.* 338
20. Under the facts of this case, held, that the false affidavit and certificate which the defendant executed must be treated as complete and separate instruments, and the same as though they were wholly detached from the other papers constituting the proofs of death; and being in the exact form required by the insurance company, and not being in any way invalid or defective upon their faces, are the subject of forgery within the terms of the statute. *Id.* 338, 339
21. *Information—Waiver of Defects.* Where a criminal warrant is issued upon an information charging the defendant with selling intoxicating liquors in violation of law, and the defendant,

CRIMINAL LAW—CONTINUED:

- without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, enters into a recognizance for his appearance at the next term of the court, and is thereby discharged from arrest, he waives any supposed defects or irregularities in the issuing of the warrant without a sufficient verification of the information, and cannot afterward for that reason and upon motion have the warrant quashed or set aside. *The State v. Longton*..... 375
22. *Beginning of Prosecution; Statute of Limitations.* The mere filing of a complaint before a magistrate charging the commission of a felony upon which no warrant is issued nor arrest made, is not such a commencement of the prosecution as will take the case out of the operation of the statute of limitations. *In re Griffith, Petitioner*..... 377
23. *Statute of Limitations.* Imprisonment in the state penitentiary does not fall within any of the exceptions of the limitations upon criminal prosecutions; and therefore the time of imprisonment of the accused within the state, which passes before a prosecution is begun, cannot be excluded from the statutory period of limitation. *Id.*..... 377
24. *Intent, Evidence to Show.* Where a person is charged under § 253 of the act regulating crimes and punishments with willfully disturbing the peace and quiet of another person and his family, and the county attorney relies for a conviction upon the conduct of the defendant on a particular day, previous conduct of the defendant of a similar character, in connection with other facts, may be shown for the purpose of showing that the conduct of the defendant on the particular day was willful. *The State v. Burns*..... 387
25. *Conviction, When Sustained.* And where such conduct is directed primarily against some person other than the prosecuting witness and his family, and is wrongful and willful, and the natural and necessary consequence of such conduct is to disturb the peace and quiet of the prosecuting witness and his family, and this the defendant knows, a conviction will be sustained. *Id.*... 387
26. *Boarding Prisoners.* The duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff, and to him alone is the county liable for the same. *Hendricks v. Comm'rs of Chautauqua Co.*... 483
27. *Medical Services for Prisoners; Liability of County.* Under § 331 of the criminal code the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board. *Id.*... 483
28. *Entire Judgment, Suspended by Appeal.* The defendant was convicted first before a police judge, and afterward in the district court, for violating an ordinance of a city of the third class, and he then appealed to the supreme court. The sentence was that "he should pay a fine and the costs of suit, and that he stand

CRIMINAL LAW—CONTINUED:

- committed to the jail of the county until the amount of said fine and costs shall be paid." *Held*, That the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court. *City of Miltonvale v. Lanoue*..... 608
29. *Imprisonment; Order, Not Erroneous.* And further held, in such case, that the order of the district court providing for the imprisonment of the defendant in the county jail, which order is in compliance with § 1 of chapter 84 of the Laws of 1879, (Comp. Laws of 1879, ¶ 943,) is not erroneous, notwithstanding § 66 of the act relating to cities of the third class, and notwithstanding the fact that the ordinance provided for imprisonment in the city jail and not in the county jail. *Id.*.... 608
30. *Nuisance—Insufficient Complaint.* A complaint filed under § 319, of ch. 31, Comp. Laws of 1879, which charges the defendant with putting "the part of a carcass of any dead animal into any river, creek, pond, road, street, alley, lane, lot, field, meadow, or common," but which does not substantially allege that the act of the defendant complained of resulted to the injury of the health or to the annoyance of the citizens of the state, or any of them, is insufficient, and a motion to quash such complaint should be sustained. *The State v. Wahl*..... 608
31. *Verdict, When Not Set Aside.* Where the testimony offered by the state, when taken alone, is competent and sufficient to sustain the prosecution, a verdict which has been approved by the district court will not be set aside in the supreme court for insufficiency of the evidence. *The State v. Smith*..... 618
32. *New Trial, No Ground for.* As a general rule, newly-discovered evidence the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. *Id.*..... 618
33. *Inadmissible Evidence.* The declarations of a party other than the defendant which formed no part of the *res gesta*, although they may amount to an admission that he committed the offense charged against the defendant, are not admissible in evidence in behalf of the defendant, and an application for a new trial based on such evidence was properly refused. *Id.*..... 618
34. *Evidence examined, and held to be sufficient to sustain a charge of assault.* *Id.*..... 618
35. *Bigamy—First Marriage—Allegation and Evidence.* In a prosecution for bigamy, it is not necessary to allege in the information or indictment the exact time and place of the first marriage. It is sufficient in that respect to allege and prove that the marriage relation existed between the accused and his first wife at the time of the second marriage. *The State v. Hughes*..... 626
36. *Former Marriage; Competent Evidence.* In such a prosecution, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, are evidence tending to prove an actual marriage, upon which a jury may convict. *Id.*..... 626
37. *Inadmissible Evidence for Defendant.* The declarations of the defendant, made in his own favor, respecting the first marriage,

CRIMINAL LAW—CONTINUED:

- which formed no part of any statement or conversation called out by the state, and which were no part of the *res gestæ*, are inadmissible for the defense. *Id.* 626
38. *Revision of Sentence.* The district court may, until the term ends, revise, correct or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation. *Id.* 626
39. *Public Offense, Charged.* A criminal complaint filed in a justice's court, charging among other things that the defendant, certain articles "of the goods and chattels of one M. [who is not the defendant], then lately before feloniously stolen, taken and carried away, unlawfully and feloniously did buy and receive," "contrary to the statute in such case made and provided," charges a public offense, although it may not in express terms, but only impliedly, charge that the property was "stolen from another" than the defendant. *The State v. McLaughlin.* 650
40. *Instruction, Not Applicable to Facts.* An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in evidence. *The State v. Whitaker.* 731
41. *Erroneous Instruction.* Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury, not warranted by the facts in evidence, is erroneous; and unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside. *Id.*, 731

CROSS-EXAMINATION—SEE "PLEADING AND PRACTICE," 1.

CURATIVE STATUTE—SEE "LEGISLATURE," 4.

D.

DAMAGES:

1. *Excavation on Verge of Lot.* The fact that a land-owner has erected a building upon the verge of his lot will not preclude an adjacent lot-owner from excavating to the usual depth, and to the extreme limits of his lot, preparatory to the erection of a building thereon, nor make him liable for any damage thereby occasioned to his neighbor's building, providing the excavation is made with reasonable skill and caution, and with no improper motive. *Winn v. Abeles.* 85
2. *Unliquidated Damages, When a Set-Off.* Unliquidated damages arising from contract may constitute a set-off against a note secured by a chattel mortgage; and if such unliquidated damages exceed the mortgage debt, the mortgagee is not entitled to the possession of the property described in the mortgage, as against the mortgagor, asserting such unliquidated damages and pleading the same in an action founded upon the note and mortgage. *Gardner v. Risher.* 93
3. *Minor Child--Manumission.* In a suit to recover damages for the death of a minor under § 422 of the code, the fact that the parents had released to such minor his time and services during his minority, may properly be considered by the jury in determining the amount of recovery, but it will not prevent

DAMAGES—CONTINUED:

- the parents from recovering any pecuniary damages, such as the loss of support, that they may be able to prove resulted from his death. *St. J. & W. Rld. Co. v. Wheeler*..... 185
4. *Eaves-Trough, Damage by Water for Want of.* Where two buildings are situated near each other, upon lots adjacent, and the eaves of one come within a few inches of the side or wall of the other, and the owner of such building has no eaves-trough, gutter, or other conductor for carrying off the rain or water falling upon his building, *held*, that an action will lie against him for any damage to the adjoining building, or its contents, caused by the water falling on the roof, and discharged against the wall of such adjoining building, on account of the absence of the proper eaves-trough, gutter, or other conductor to carry off such water. *Hazeltine v. Edgmand*..... 202
5. *Misleading Instructions.* Where the defendant, who is the owner of a building, has no eaves-trough, gutter, or other conductor to prevent the water falling and gathering on his roof from being discharged and thrown against and upon the wall of an adjoining building, and the plaintiff, as the owner of such adjoining building, brings an action against the defendant to recover damages for permitting the water falling on the roof of defendant's building to be discharged against and upon the wall of his building; and there is no evidence tending to show that the injuries complained of resulted from extraordinary or accidental circumstances, and no evidence tending to show that the defendant had any right, by grant, permission, or prescription, to allow the rain falling upon his building to be discharged from the eaves thereof upon the adjoining building, *held*, that the following portions of the charge given to the jury are misleading, and in a very close case, sufficient ground for reversing the judgment rendered against the plaintiff, namely: "The defendant is liable for all the consequences resulting from such defects or acts, unless the same resulted from extraordinary or accidental circumstances;" and "a party has no right to make any erections on his premises and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, except upon or by express grant or permission, or else by prescription for such length of time as furnishes a presumption of a grant so to do, which is usually for a term of years—twenty years or more for prescription, but if by permission or grant, no particular length of time is required." *Id.*..... 202, 203
6. *Conversion; Measure of Damages.* In an action to recover damages for the seizure and conversion of a stock of merchandise, the plaintiff is entitled to recover the value of the property at the time of conversion, with interest thereafter at the rate of seven per cent. Evidence examined, and held to be sufficient to sustain the verdict. *Simpson v. Alexander*..... 225
7. *Measure of Recovery.* Although several separate suits may be brought for a joint liability, yet where the injury is an entirety, the damages resulting therefrom cannot be apportioned among the wrongdoers nor divided into separate demands; and where the injured party sues one of the wrongdoers and demands only a part of the damages which he suffered by the injury, a recovery and satisfaction therein will operate as a bar to any further claim of damages against the others. *Westbrook v. Mize*..... 299, 300

DAMAGES—CONTINUED:

8. *Measure of Recovery.* In an action of replevin brought by a mortgagee of chattels, where the property remains in the hands of the defendant, and is sold by the defendant for more than the plaintiff's claim, with interest, and judgment is rendered in favor of the plaintiff, but only for his damages, and not for a return of the property, *held*, that he may recover as his damages the amount of his claim, with interest, although the petition was only an ordinary petition in replevin. *Dolan, Sheriff, v. Van Demark*..... 305
9. *City, When Liable for Negligence.* Where a person passing along the sidewalk of a much-traveled street in a city of the first class is injured by the falling of a bill or show-board, blown down by a strong wind, which bill or show-board was negligently and imperfectly constructed on private property, but was partly supported by studding or uprights nailed to the sidewalk, and was so near to and adjoining the sidewalk as to be dangerously contiguous thereto, and the officers of the city knew, before the falling of the bill or show-board, that it was not put up in a safe and proper manner, and that it was so insecure as to endanger persons passing on the street, *held*, the city will be liable in damages therefor, if the person so injured used ordinary care and prudence to avoid the danger. *Langan v. City of Atchison*.... 318
10. *Contract; Sum Named, a Penalty.* Where H. sells his business and good-will to G., and as a part of the same transaction executes a written instrument in which he says: "I, —, bind myself in the sum of \$500" that I will not engage in such business at the same place for the period of five years, *held*, that the sum named in the instrument is a penalty, and not liquidated damages; and for a breach of the agreement by H., G. may recover only his actual damages. *Heatwole v. Gorrell*..... 692
11. *Fixed Sum, When a Penalty, and Not Liquidated Damages.* Whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that may occur, or the amount of the damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages. *Id.*..692, 693

See "RAILROADS, AND RAILROAD COMPANIES," 5, 11, 20, 31, 38, 42, 43, 44.

DECREE—SEE "JUDGMENT."

DEDICATION—SEE "HIGHWAY," 4, 5.

DEED—SEE "CONVEYANCE."

DEMURRER—SEE "PLEADING AND PRACTICE," 20.

DESCRIPTION—SEE "MECHANICS' LIEN," 3.

DIRECTORS—SEE "BANK."

DISTRICT JUDGE—SEE "WITNESS," 1.

DISTURBING THE PEACE—SEE "CRIMINAL LAW," 24, 25.

DIVISION OF LAND FOR TAXATION—SEE "TAXES, AND TAXATION," 4.

DIVORCE:

1. *Fraud; Review.* Where an action is commenced by a defendant within six months after the rendition of a decree of divorce to vacate the same upon the charge of the fraud of the plaintiff, and in such case a judgment is rendered against the defendant, a subsequent proceeding to review said judgment may be commenced in the supreme court within one year after its rendition.
Haverty v. Haverty..... 438
2. Attorney and client; good faith. *Id.*..... 438

DRAFT—SEE "FRAUD," 4.

DUE PROCESS OF LAW—SEE "CRIMINAL LAW," 7, 8.

E.

EAVES-TROUGH—SEE "DAMAGES," 4, 5.

EJECTMENT:

Occupying-Claimant Law; Proceeding in Error; No Estoppel.

Where a defendant who is defeated in an action in the nature of ejectment, after the verdict is rendered, files in the office of the clerk of the district court a written request for the benefit of the occupying-claimant law, and the judgment recites that the defendant has made claim for improvements as an occupying claimant, but such defendant stops with said request, and does not demand a jury for the assessment of his improvements, and excepts to the findings of fact and conclusions of law, and to the judgment rendered, and also obtains time in which to make and serve a case to review the rulings of the trial court, *held*, such defendant is not estopped by the steps so taken by him from instituting and maintaining proceedings in error to reverse the judgment rendered in the action against him. *Mack v. Price*..... 134

See "ACTION," 4; "HOMESTEAD," 1.

ELECTION:

1. *Tie Vote in Council.* The mayor of a city of the second class is authorized to give a casting vote upon the confirmation of an officer appointed by him, where the council is equally divided on the question. *Carroll v. Wall*..... 36
2. *Justice of the Peace; Election to Fill Vacancy.* The governor appointed the defendant, in August, 1885, to fill a vacancy in the office of justice of the peace of the city of Topeka. The plaintiff was voted for and claimed to have been elected to fill such vacancy at the general election held in November, 1885. *Held*, That the vacancy could not be filled by an election before the regular city election held in April, 1886, to which time the defendant was entitled to hold the office under the appointment of the governor, and until his successor then chosen had qualified. *Ward v. Clark*..... 315
3. *County-Seat Election; Mandamus; Jurisdiction of Supreme Court.* In an action of mandamus, brought in the supreme court in the name of the state of Kansas, by the attorney general, to

ELECTION—CONTINUED:

compel the county officers of a certain county to hold their offices at the town of K., which is alleged to be the county seat of the county, *held*, that the supreme court has jurisdiction to hear and determine the case, although in the determination thereof it may be necessary to determine the result of an election held in the county to permanently locate the county seat of such county, and for frauds perpetrated in one of the townships of such county, to wholly ignore the returns from such township and the canvass thereof, and the declaration made by the board of canvassers that a place other than K. had become by such election the permanent county seat of the county. *The State, ex rel., v. Comm'rs of Hamilton Co.* 640

4. *No Registration of Voters, When.* Chapter 89 of the Laws of 1881, which provides generally for the registration of voters at county-seat elections, has no application to the first election held in a newly-organized county. *Id.* 640
5. *Returns, etc., Wholly Ignored for Fraud.* Where an election has been held in a county for the permanent location of the county seat, and it appears from the evidence that more than two-thirds of the votes cast in one township, as shown by the returns from that township, were illegal and fraudulent, and it cannot be accurately ascertained how many legal votes were polled in such township; and other frauds were committed, and these frauds were participated in by the judges and the clerks of the election, and others, *held*, in an action of mandamus, such as is mentioned in the first number of this syllabus, that the returns from the aforesaid township and the canvass thereof, and the declaration of the canvassing board, will be wholly ignored by the court, and not considered as any evidence in determining the result of the election. *Id.* 640, 641

See "COUNTIES, AND COUNTY OFFICERS," 1, 2.

EMBEZZLEMENT—SEE "WAIVER OF TORT."

EMERGENCY—SEE "STATUTE," 2.

ENROLLED STATUTE—SEE "STATUTE," 6.

EQUITY:

1. *Estoppel.* If one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterward try to assert his title. *Gray v. Crockett.* 66
2. *Equitable Title—Sale to Satisfy Mortgage.* Where the mere nominal and legal title to a tract of land is conveyed without consideration, and with the intention and understanding that the real title and interest thereto shall remain in the grantor, who, for a period of more than eight years thereafter, and until his death, continued in possession and cultivated and treated it as his own, paying the taxes, and making valuable and lasting improvements thereon; and the grantee, although living in the immediate vicinity, made no claim to the possession of the land, or to the rents and profits of the same, and did not pretend to own or to exercise any supervision or control over it until after the death of the grantor: *Held*, That the full equitable title to the land was in the grantor at the time of his death, and that the same may be sold to satisfy a mortgage previously given thereon by such grantor. *Morgan v. Field.* 162

EQUITY—CONTINUED:

8. *Contract; Specific Performance—When Enforced, When Not.* A contract will be specifically enforced only where its specific enforcement is equitable; and generally, only where the plaintiff has in equity and good conscience a right to demand its specific enforcement; and generally, where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced. *Bird v. Logan*..... 228
- See "AGENCY," 1; "ESTÖPPEL," 1, 2; "HOMESTEAD," 1, 4, 5, 6.

ERROR:

1. *Tax Deed; Error as to Amount of Consideration.* Where the county clerk, in executing a tax deed, inserts as the consideration for the deed the amount of the taxes paid by the holder of the tax title and his assignor, without adding any interest or costs, as he should do, and such error is shown by the tax deed itself, and the redemption notice showed "the amount of taxes charged and interest calculated to the last day of redemption," which of course was a larger amount than the amount inserted in the tax deed as the consideration therefor, held, that such error of the county clerk with respect to the amount of the consideration for the tax deed does not render the tax deed void. *Davis v. Harrington*..... 196
2. *Erroneous Instruction.* In an action against a railroad company to recover for personal injuries where the plaintiff specifically alleged that the injury was caused by the negligence of his coemployé, the engineer of the train, and no other basis of recovery was stated, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that the plaintiff might recover if the injury was caused by the negligence of the fireman. *A. T. & S. F. Rld. Co. v. Irwin*... 286, 287
3. *Communications between Husband and Wife.* The plaintiff caused the deposition of one of the defendants to be taken prior to the trial in which the witness gave testimony concerning communications had with her husband during the marriage, and prior to his death. Held, That the testimony falls within the prohibition of the code which forbids husband or wife "to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted, or afterwards," and its admission over the objection of the defendants was error. *French v. Wade*..... 391
4. *Erroneous Injunction, Valid until Dissolved.* Where the district court has jurisdiction of the parties and of the subject-matter, the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been properly dissolved. *Billard v. Erhart*..... 616
5. *Order of Arrest; Bail, When Exonerated.* The bail in an undertaking for a defendant arrested in a civil action, executed under § 159 of the civil code, is exonerated if the order of arrest is erroneously vacated by the district court or the judge thereof on account of the alleged insufficiency of the affidavit upon which the order is issued, and no stay of the order of vacation is granted, as the right to arrest or surrender the defendant given by the statute to the bail as their security is taken away by such vacation and discharge. *Baker Mfg. Co. v. Fisher*..... 659

ERROR—CONTINUED:

6. *Erroneous Instruction.* Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury, not warranted by the facts in evidence, is erroneous; and unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside. *The State v. Whitaker*..... 781
See "INSTRUCTIONS," 1, 2, 4, 5, 6, 7.

**ERRORS OF FACT—SEE "JUSTICES, AND JUSTICES' COURTS," 2;
"PRACTICE, SUPREME COURT," 9.**

ESTOPPEL:

1. *Claim of Title.* If one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterward try to assert his title. *Gray v. Crockett*..... 66
2. *Specific Performance; Wife, Estopped from Claiming Title.* Where a married woman owned thirty-three acres of real estate within the limits of an incorporated city, upon which she and her husband lived, and one acre thereof was their homestead, and her title from her husband is not recorded, although the deed under which she claims was deposited with the register of deeds for record, but by him put away in a package where it remained over twenty years, and could not have been found only by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing it, and her husband enters into a written contract for the sale of the real estate, and the wife is present at the time of making the contract, heard its contents stated, knew the terms and conditions thereof, and did not dissent therefrom, except by expressing a desire that the deferred payments provided in the contract should draw ten per cent. interest instead of eight, and after an action is commenced against her husband for the specific performance of the contract, to which she is a party, did not disclose her title for more than two years: *Held*, She will be estopped from setting up title to the land, which is not a part of the homestead, to defeat a suit brought against her husband for the specific performance of his contract, and so will the grantee of herself and husband, if such grantee had no actual knowledge of the unrecorded deed and dealt with the land at the time of the subsequent purchase as that of the husband, and had notice of the prior contract of sale. *Id.*..... 66, 67
3. *Part Payment; Creditor not Estopped by Receipt.* The payment of a portion of an ascertained, overdue, and undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance; and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt. *St. L. Ft. S. & S. W. Rld. Co. v. Davis*..... 464

See "EJECTMENT;" "PRACTICE, DISTRICT COURT," 6.

EVASIVE ANSWERS—SEE "INSTRUCTIONS," 5; "JURY," 5. 6.

EVIDENCE:

1. *Impeaching Evidence; No Material Error.* The plaintiff introduced evidence for the purpose of impeaching the testimony of one of the witnesses for the defendant, and in doing so introduced some evidence that could not have been introduced in any other manner, and might have been left out of the case entirely; but *held*, under the circumstances of the case, that the court did not commit material and reversible error. *Clark v. Phelps* 43
2. *Record, not Received in Evidence.* The record of a deed filed in the office of a register of deeds May 21, 1883, acknowledged before a notary public in this state, but not authenticated with his notarial seal, cannot be received in evidence under the provisions of § 12, ch. 87, Laws of 1870; § 887a, Code, Comp. Laws of 1879. *Meskinen v. Day* 46
3. *Competent Evidence.* Where a surety claims and testifies that he signed the recognizance only upon the condition that another should join him as co-surety, proof that he was led to sign it by other considerations, such as indemnity furnished or property turned over to him by the prisoner, is not incompetent. *Madden v. The State* 147
4. *Default of Principal; Inadmissible Evidence.* Proof cannot be offered by the surety that the default of the principal was excused, unless the acts relied on to excuse the default, and which rendered the performance of the condition of the recognizance impossible, have been pleaded by such surety. *Id.* 147
5. *Charter—Copy as Evidence.* A copy of the charter of a corporation created under the laws of this state, duly certified by the secretary of state, under the seal of the state, is evidence of the creation of such corporation. *Mining Co. v. Adams* 193
6. *Corporation—Questioning Existence.* In an action by a mining company against a subscriber of stock for installments upon his subscription for stock of the corporation, such subscriber or stockholder cannot, in a collateral way, question the existence of the corporation, or the regularity of its organization. *Id.* . 198
7. *Testimony Given by Defendant.* The testimony given by the defendant on his preliminary examination, and which is reduced to writing and signed by him, may, when properly identified, be offered in evidence by the state against him. *The State v. Miller* 328
8. *Forgery; Instrument Good on its Face.* A false instrument or writing, made out with criminal intent to defraud, which is good on its face, may be legally capable of effecting the fraud, even though inquiry into extrinsic facts or matters not appearing on its face would show it to be invalid, even if it were genuine; therefore, the forging of such an instrument or writing is an offense under the statute. *The State v. Hilton* 338
9. Under the facts of this case, *held*, that the false affidavit and certificate which the defendant executed must be treated as complete and separate instruments, and the same as though they were wholly detached from the other papers constituting the proofs of death; and being in the exact form required by the insurance company, and not being in any way invalid or defective upon their faces, are the subject of forgery within the terms of the statute. *Id.* 338, 339

EVIDENCE—CONTINUED:

10. *Intent, Evidence to Show.* Where a person is charged under § 253 of the act regulating crimes and punishments with willfully disturbing the peace and quiet of another person and his family, and the county attorney relies for a conviction upon the conduct of the defendant on a particular day, previous conduct of the defendant of a similar character, in connection with other facts, may be shown for the purpose of showing that the conduct of the defendant on the particular day was willful. *The State v. Burns*..... 387
11. *Evidence of Authority.* While an agent may testify under oath as to his authority to act for the principal, the mere declarations of one who professes to be an agent are not competent evidence to establish his agency. *French v. Wade*..... 391
12. *Communications between Husband and Wife.* The plaintiff caused the deposition of one of the defendants to be taken prior to the trial in which the witness gave testimony concerning communications had with her husband during the marriage, and prior to his death. *Held*, That the testimony falls within the prohibition of the code which forbids husband or wife "to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted, or afterwards," and its admission over the objection of the defendants was error. *Id.*..... 391
13. *Conversation between Civil Engineer and Roadmaster.* Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division roadmaster, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer made in such conversation may be given in evidence as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division. *St. L. & S. F. Rly. Co. v. Weaver*..... 418
14. *Repairs after Accident.* The injuries complained of were caused by the alleged incapacity of a passage-way for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such water-way. *Held*, That this evidence did not of itself prove negligence, nor that the defendant had notice of the insufficiency of the water-way prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but at most it only tended to prove, by way of admission on the part of the defendant, that the water-way was originally too small; and the introduction of such evidence for this purpose was not erroneous. *Id.*..... 418
15. *Receipt.* A receipt is only *prima facie* evidence of the admissions which it contains, and where it does not embody a contract it is open to explanation, and the party admitting payment in full may show it to be untrue. *St. L., Ft. S. & W. Rld. Co. v. Davis*..... 464
16. *Boundaries, General Reputation to Prove.* Where the identity and boundaries of city lots cannot be determined by the re-

EVIDENCE—CONTINUED:

- corded plat, nor from any monuments on the ground, general reputation may be received to establish them, in the absence of evidence of a higher and better nature. *Stetson v. Freeman*.... 523
17. *Enrolled Statute; Presumption.* The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively and beyond all doubt, that the act was not passed regularly and legally. *Weyand v. Stover, Treas.*..... 546
18. *Record; Presumptions.* A part of a record will generally prove what it purports to prove, but cannot prove more than that, and no liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding deficiencies, or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record. *Capital Bank v. Huntoon*..... 580
19. *New Trial, No Ground for.* As a general rule, newly-discovered evidence the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. *The State v. Smith*..... 618
20. *Inadmissible Evidence.* The declarations of a party other than the defendant which formed no part of the *res gestæ*, although they may amount to an admission that he committed the offense charged against the defendant, are not admissible in evidence in behalf of the defendant, and an application for a new trial based on such evidence was properly refused. *Id.*..... 618
21. *Evidence examined, and held to be sufficient to sustain a charge of assault.* *Id.*..... 618
22. *Bigamy—First Marriage—Allegation and Evidence.* In a prosecution for bigamy, it is not necessary to allege in the information or indictment the exact time and place of the first marriage. It is sufficient in that respect to allege and prove that the marriage relation existed between the accused and his first wife at the time of his second marriage. *The State v. Hughes*..... 626
23. *Former Marriage; Competent Evidence.* In such a prosecution, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, are evidence tending to prove an actual marriage, upon which a jury may convict. *Id.*..... 626
24. *Inadmissible Evidence for Defendant.* The declarations of the defendant, made in his own favor, respecting the first marriage, which formed no part of any statement or conversation called out by the state, and which were no part of the *res gestæ*, are inadmissible for the defense. *Id.*..... 626
25. *Conversation; Incompetent Evidence.* A conversation between two employes of a railroad company concerning a past transaction, is incompetent evidence as against the railroad company to prove such transaction. *U. P. Rly. Co. v. Fray*..... 700

EVIDENCE — CONTINUED:

26. *Official Letter.* The copy of an official letter received by the register or receiver of any land office of the United States from any department of the government of the United States, that has been duly certified by the register or receiver having the custody of such letter, is admissible in evidence the same as the original; and where the official character of the letter is apparent upon its face, it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter. *Darcy v. McCarthy*..... 722
27. *Immaterial Question.* Where the question whether the defendant had an insurance on certain property, or not, arises incidentally in the case, and the plaintiff proves that he had, and the defendant afterward, by his own testimony, shows that he had, it is immaterial whether the evidence showing in the first instance that he had such an insurance is competent, or not. *Reed v. New*..... 727
28. *Horses — Value — Competent Witness.* Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto. *Held*, That there was no error in charging the jury. *Id.*..... 727
29. *Carriage on Connecting Lines; Loss; Liability.* The sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines the same as on its own. *A. T. & S. F. Rld. Co. v. Roach*.... 740
30. *Community of Interest; Last Carrier, When not Liable.* The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination. *Id.*..... 740
- See "FINDINGS."

EXECUTION — SEE "JUDGMENT," 9.

EXEMPTION:

1. *Earnings of Debtor; Residence.* The earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt under § 490 of the civil code and § 157 of the justices act, from such payment, if it be made to appear that such earnings are necessary for the maintenance of his family, supported wholly or partly by his labor; and as the

EXEMPTION—CONTINUED:

statute of the state does not restrict the exemption to residents, the courts have no authority to make such restriction; therefore, no distinction is to be made between residents and non-residents. *K. C. St. J. & C. B. Rld. Co. v. Gough & Linley*. 1

2. *Garnishment; Non-Resident Debtor.* Where a citizen of this state attempts by a proceeding in garnishment against a foreign railroad corporation to subject to the payment of his claim in the courts of this state the personal earnings of a citizen of another state, which personal earnings are by the laws of this state, and also of such other state, exempt from being so applied, the earnings of such debtor are exempt from such process. *Id.* 1, 2

F.

FEDERAL COURT—SEE “COURTS,” 2.

FENCE—SEE “RAILROADS, AND RAILROAD COMPANIES,” 5.

FINDINGS:

1. *Review.* Where a case-made shows that all of the evidence offered upon the trial to sustain a particular finding of fact of the trial court is preserved therein, the supreme court can decide whether such finding is sustained by any evidence, although all of the evidence presented upon the trial upon other issues of fact is not embraced in the record. *K. C. St. J. & C. B. Rld. Co. v. Gough & Linley*. 1
 2. *Contributory Negligence.* The jury found as a fact that the plaintiff was not guilty of contributory negligence. *Held,* That the supreme court cannot say from the evidence and as a matter of law that the finding of the jury is erroneous. *St. L. & S. F. Rly. Co. v. Weaver*. 412
 3. *Negligence.* The jury found as a fact, that the defendant was guilty of negligence in two or more particulars, causing the injuries complained of. *Held,* That the supreme court cannot, under the evidence and as a matter of law, say that the finding of the jury is erroneous. *Id.* 412
- See “SHERIFF’S SALE,” 10.

FORECLOSURE—SEE “MORTGAGE,” 2, 4.

FOREIGN JUDGMENT—SEE “JUDGMENT,” 4, 5, 6.

FORGERY—SEE “CRIMINAL LAW,” 19, 20.

FORMER CONVICTION—SEE “CRIMINAL LAW,” 17.

FORMER MARRIAGE—SEE “BIGAMY.”

FRAUD:

1. In the case stated, *held,* that the taking of the possession of the land by the daughter and her first husband under the parol agreements between them and the step-mother, and the making of lasting and valuable improvements thereon, took the case out of the statute of frauds and also supplied a sufficient consideration for the property, and the acts of the parties since that time have enhanced and made stronger the daughter’s equities in and to the land. *Newkirk v. Marshall*. 78

FRAUD—CONTINUED:

2. Under the facts of this case, the daughter is in equity entitled to the land. *Id.*..... 78
3. *Vendor and Vendee; Sale—When Valid, When Not.* While generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a preëxisting debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as a security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. *Dolan, Sheriff, v. Van Demark.*..... 805
4. *Person Personating Another; Indorsement of Draft; Mistake; Liability.* Daniel Guernsey was the owner of a quarter-section of land in Butler county, in this state; he formerly resided in Butler county, but at the time of the transactions hereinafter stated lived in Iowa; an unknown person, assuming the name of Daniel Guernsey, obtained a loan from S. upon the Guernsey land, and executed his notes and mortgages for the loan in the name of Daniel Guernsey; S. sent the amount of the loan by draft by mail to the person executing the notes and mortgages, who said his name was Daniel Guernsey and whose name he then believed to be Daniel Guernsey, and made the draft payable to the order of Daniel Guernsey, intending thereby the person to whom he sent the draft. A bank received this draft for a valuable consideration, in good faith, from the same person to whom it was sent, whom the bank believed to be Daniel Guernsey, and who indorsed the draft by that name. *Held*, Although S. was mistaken and deceived in the transactions, the person he dealt with was the person intended by him as the payee of the draft, designated by the name that he assumed in obtaining the loan, and that his indorsement of it was the indorsement of the payee of the draft by that name; and further *held*, under all the circumstances of this case, as the bank took the draft in good faith and for value, S. cannot recover his loss from the bank. *National Bank v. Shotwell.*.... 860
5. *Verdict, Not Set Aside.* Where the good faith and validity of the sale of a stock of millinery by a failing debtor is challenged by the creditors, and it is shown that the vendee, who is a lawyer and real-estate agent residing in a distant city, and unacquainted with the millinery business, purchased all the property of the insolvent vendors for fifty per cent. of the cost-price, without taking an inventory of the same, and it appears that no money was paid by the vendee, but that the sale was made upon a long and unusual credit, the vendee giving his negotiable, unsecured, non-interest-bearing notes, due in six, twelve and eighteen months thereafter; and it is also shown that the sale was hurriedly made, in anticipation that the principal creditors were about to levy upon the goods and enforce the collection of their claims; and it was further shown that the vendors continued in the possession and control of the goods after the

FRAUD—CONTINUED:

- alleged sale, claiming to have been employed by the vendee: *Held*, That a verdict based on these facts, finding the sale to be invalid, will not be disturbed. *Roberts v. Radcliff, Sheriff*. . . . 503
6. *Intent to Hinder and Delay Creditors*. The sale of all the property of an insolvent debtor upon a long and unusual credit, where the necessary effect of which, as well as the intent of the parties, is to hinder and delay creditors in the collection of their claims, will be held void, although there may be an honest intention of the debtor to finally pay his entire indebtedness. *Id.*. . . . 502
7. *Fraudulent Sale; Title of Purchaser; Notice*. Where an insolvent and failing merchant makes a sale of all of his goods and merchandise for the purpose of defrauding his creditors, no one but a purchaser for a valuable consideration actually passed before notice of the fraud can, as against attaching creditors, claim title to the property which has been fraudulently disposed of. *Bush, Sheriff, v. Collins*. . . . 535
8. *Purchaser, Protected to What Extent*. Where a party purchases from an insolvent and failing merchant a stock of goods, and the merchant makes such sale with the purpose to defraud his creditors, and the purchaser thereof has no actual or constructive notice of the fraud at the time of his purchase, but subsequently and before the payment of all the consideration of his purchase has actual notice thereof, he can only be protected to the extent of the money actually paid, or the security or property actually appropriated by way of payment before notice. If notice of the fraud is after payment of a part of the purchase-money, the purchaser is only entitled to reimbursement for the money paid or the security or property actually appropriated by the seller as payment. He is not to be regarded as a purchaser for a valuable consideration as to purchase-money not paid. *Id.*. . . . 535
9. *Returns, etc., Wholly Ignored for Fraud*. Where an election has been held in a county for the permanent location of the county seat, and it appears from the evidence that more than two-thirds of the votes cast in one township, as shown by the returns from that township, were illegal and fraudulent, and it cannot be accurately ascertained how many legal votes were polled in such township; and other frauds were committed, and these frauds were participated in by the judges and the clerks of the election, and others, *held*, in an action of mandamus, such as is mentioned in the first number of this syllabus, that the returns from the aforesaid township and the canvass thereof, and the declaration of the canvassing board, will be wholly ignored by the court, and not considered as any evidence in determining the result of the election. *The State, ex rel., v. Comm'rs of Hamilton Co.*. . . . 640, 640
10. *Illegal Transaction*. As a general rule, an action which grows out of and is founded upon an illegal transaction where the plaintiff and defendant are in equal guilt, cannot be maintained. *Hinnen v. Newman*. . . . 709
11. *Parties Equally Culpable; No Cause of Action*. N. was employed by the executors of an estate to sell the property of the estate at public auction, and he entered into a secret agreement with H. to attend the sale and purchase certain horses

FRAUD—CONTINUED:

belonging to the estate for him. In pursuance of the agreement, H. appeared at the sale, and without any notice to those interested in the estate, or to the bystanders, he bid in the horses for N., but in his own name, and paid for them with his own funds. Afterward, the horses came into the possession of N.; and H., claiming the ownership, brings an action of replevin to recover the possession of them. *Held*, That the conduct of the parties in the purchase and sale of the horses, contravenes public policy and is illegal, and that as the plaintiff's right of action is founded solely on the illegal transaction, and as he is equally culpable with the defendant, he must fail. *Id.* 709, 710

See "DIVORCE."

FRAUDULENT RETURNS—SEE "ELECTION," 5.

G.

GARNISHMENT:

1. *Earnings of Debtor; Exemption; Residence of Debtor.* The earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt under § 490 of the civil code and § 157 of the justices act, from such payment, if it be made to appear that such earnings are necessary for the maintenance of his family, supported wholly or partly by his labor; and as the statute of the state does not restrict the exemption to residents, the courts have no authority to make such restriction; therefore, no distinction is to be made between residents and non-residents. *K. C. St. J. & C. B. Rld. Co. v. Gough & Linley*, 1
2. *Non-Resident Debtor.* Where a citizen of this state attempts by a proceeding in garnishment against a foreign railroad corporation to subject to the payment of his claim in the courts of this state the personal earnings of a citizen of another state, which personal earnings are by the laws of this state, and also of such other state, exempt from being so applied, the earnings of such debtor are exempt from such process. *Id.* 1, 2
3. *Obligation; Sureties, When Liable.* M. owed \$165 either to A. or to N., and O., in an action against A., claiming that the debt was due to A., garnished M., and the court ordered M. to pay the money into court. N., however, claimed the money as the creditor of M., and M., not knowing to whom he was liable, and wishing to leave the state, entered into an agreement with A. and N. and B. and others, that he should pay the money to B., and that B. should retain the same until the question should be finally decided by a judicial determination whether the money belonged to N., or to A., or to O., and that after such determination B. should pay the money to whom it belonged; and the money was in fact paid to B., and he as principal, and others as sureties, executed to M. and A. and N. an obligation to secure the faithful fulfillment of the agreement; and nothing has transpired since to render B. and his sureties liable to an action on the obligation: *Held*, In an action by N. against the obligors on their obligation, that they are not liable; or, in other words, that the obligors are not liable to N. until it is at least settled that the garnishee is not liable in the garnishment proceedings. *Noble v. Bowman*..... 15

GENERAL REPUTATION—SEE "EVIDENCE," 16.

GOOD FAITH—SEE "ATTORNEY AT LAW," 3.

GOVERNOR'S MESSAGE—SEE "LEGISLATURE," 2, 3.

GROWING CROP—SEE "MORTGAGE," 1.

GUARANTY—SEE "RAILROADS, AND RAILROAD COMPANIES," 14, 17.

GUARDIAN AND WARD:

1. *Guardian's Bond, Construed.* From the language of the bond sued on in the present case, and other facts, *held*, that the bond was given under § 7 of the act relating to guardians and wards, and not under § 15 of said act. *Morris v. Cooper*..... 156
2. *Purpose of Bond.* A guardian's bond executed under § 7 of the act relating to guardians and wards is intended as a security only for the proper use of the personal estate of the ward and the rents and profits of his real estate, and is not intended as a security for the proper use of the purchase-money received by the guardian on the sale of the real estate of the ward—an other bond being required to be given for that purpose by § 15 of said act. *Id.*..... 156

GUARDIAN'S BOND—SEE "GUARDIAN AND WARD."

H.

HABEAS CORPUS—SEE "CRIMINAL LAW," 2.

HIGHWAY:

1. *Railroad Whistle—Sounding Before Crossing Highway.* It is the duty of a railroad company, in running its trains over its track, to have the whistle of its engines sounded three times, at least eighty rods from the place where the railroad crosses any public highway, except in cities and villages. Where no whistle is sounded, or other alarm given, and damages are sustained by a train of cars running over cattle upon the highway, the company is chargeable with negligence, and it is not relieved from its liability therefor, merely by the evidence of the owner of the cattle, in charge of the same, that he saw the smoke and heard the puffing of the engine drawing the train, more than half a mile from the crossing; because no one is bound to conclude that the engine or train will cross the highway without sounding the whistle three times, at least eighty rods from the crossing. *Mo. Pac. Rly. Co. v. Stevens*..... 622
2. *Regular and Extra Trains; Competent Witness.* Where a person has lived several months on a farm, near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one. *Id.*..... 622
3. *Road District; Later Statute Controls.* Where the legislature has by the passage of a later statute constituted each city of the first class a separate road district, and given such cities full control over the labor to be performed upon its streets, and authorized ordinances to be enacted to enforce the same, the later statute is controlling, as it is a substitute for the prior statute, so far as it conflicts therewith. *In re Dassler, Petitioner*..... 678

HIGHWAY—CONTINUED:

4. *Road, When not a Public Road.* Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years, is not sufficient to constitute it a public highway. *The State v. Horn*..... 717
5. *Road, When not a Public Highway by Prescription.* Where a road has been traveled for more than fifteen years, but has not been established under the statutes of the state, and has not been expressly dedicated nor impliedly dedicated, unless by prescription or limitation, and the land over which it runs was for several of the first years vacant and unoccupied, *held*, that such road is not a public highway by prescription or limitation, unless the public, by its constituted authorities, took the possession of the road and used it and maintained it as a public highway for at least fifteen years. *Id.*..... 717

HOMESTEAD:

1. Occupation under devise; ejectment not maintained. *Newkirk v. Marshall*..... 77
2. *Vested Rights.* Under the United States homestead laws and by a compliance therewith, a vested right is obtained in the homestead at the expiration of five years from the entry thereof. *Id.*..... 77, 78
3. *Patent, When.* When proper proof of settlement, occupancy, etc., is made in such a case, the person to whom the patent should be issued is entitled to the patent immediately, and may then contract with reference to the land the same as though the patent had already and in fact been issued. *Id.*..... 78
4. *Statute of Frauds; Consideration.* In this case, the taking of the possession of the land by the daughter and her first husband under the parol agreements between them and the step-mother, and the making of lasting and valuable improvements thereon, took the case out of the statute of frauds and also supplied a sufficient consideration for the property, and the acts of the parties since that time have enhanced and made stronger the daughter's equities in and to the land. *Id.*..... 78
5. Under the facts of this case, the daughter is in equity entitled to the land. *Id.*..... 78
6. *Conveyance Without Joint Consent.* Where a husband and wife execute a bond for a conveyance of their homestead, and they are ignorant and illiterate and can have no knowledge of the contents of the bond except as they are informed by others, and they execute the bond at different times, and the wife executes the bond after the husband has executed the same, and without any consultation with him or knowledge of its contents or its nature or character, or of any of the transactions connected therewith, except as she is informed by a notary public, acting as the agent of the obligee, and she executes the bond under a misapprehension as to the consideration for it, and as to the amount of a lien held by the obligee upon the real estate to be conveyed, which lien he is to remove, and these misapprehensions are brought about and induced by the agent of the obligee; and the consideration for the real estate agreed to be conveyed is inadequate: *Held*, Assuming that the husband was properly informed concerning all these matters, that there was no sufficient "joint consent" on the part of the

HOMESTEAD—CONTINUED:

husband and wife to the alienation of their homestead, and no sufficient equitable grounds for the specific enforcement of their contract, as will authorize an action in equity on the part of the obligee against the obligors for the specific enforcement of the contract; and further *held*, that the action cannot be maintained, whether the husband was properly informed, or not. *Bird v. Logan*..... 228

7. Contract; specific performance—when enforced, when not. *Id.*, 228
See “ESTOPPEL,” 2.

HUSBAND AND WIFE—SEE “ESTOPPEL,” 2; “EVIDENCE,” 19.

I.

ILLEGAL TRANSACTION—SEE “ACTION,” 12, 13; “FRAUD,” 10, 11.

IMPEACHMENT—SEE “PLEADING AND PRACTICE,” 8; “WITNESS,” 3.

IMPRISONMENT—SEE “CRIMINAL LAW,” 2, 3, 5, 29.

IMPRISONMENT IN THE PENITENTIARY—SEE “LIMITATION OF ACTIONS,” 8.

INADEQUACY OF PRICE—SEE “SHERIFF’S SALE,” 6.

INDORSEMENT—SEE “DRAFT;” “PROMISSORY NOTE,” 2.

INFORMATION—SEE “CRIMINAL LAW,” 10, 21, 39.

INJUNCTION:

1. *Void Order.* Where an injunction is granted at the commencement of an action by a district judge, without notice or appearance by the defendants, and no undertaking is furnished by the plaintiff, and no summons is issued, but the district clerk issues an alleged order of injunction forbidding the defendants from doing certain acts not recited or referred to in the petition, *held*, such order has no operation, and is wholly void, and may be disregarded by anyone. *The State, ex rel., v. Comm’rs of Rush Co.*..... 150
2. *When Granted, When Not; Notice.* The statute expressly provides, if a court or judge deem it proper that the defendant, or any party to the suit, shall be heard before granting a temporary injunction prayed for, that reasonable notice may be given to such party, and in the meantime a restraining order may be issued; therefore, a court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions, without notice is not in accordance with a fair and orderly administration of justice. *A. T. & S. F. Rld. Co. v. Fletcher*..... 236, 237
3. *When Not a Matter of Right.* The owner of a lot in a city is not entitled, as a matter of right, to an injunction against a party from obstructing a sidewalk or street in such city, where

INJUNCTION—CONTINUED:

the owner's lot or land does not abut upon and is not opposite or contiguous to the obstruction, since the injury or nuisance complained of is not different in kind from that sustained by the public. *Billard v. Erhart*..... 611

4. *Erroneous Injunction, Valid until Dissolved.* Where the district court has jurisdiction of the parties and of the subject-matter, the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been properly dissolved. *Id.*..... 616

See "TAXES, AND TAXATION," 17.

INNOCENT PURCHASER—SEE "SHERIFF'S SALE," 11, 12.

INSTRUCTIONS:

1. *Misleading Instructions.* Where the defendant, who is the owner of a building, has no eaves-trough, gutter, or other conductor to prevent the water falling and gathering on his roof from being discharged and thrown against and upon the wall of an adjoining building, and the plaintiff, as the owner of such adjoining building, brings an action against the defendant to recover damages for permitting the water falling on the roof of defendant's building to be discharged against and upon the wall of his building; and there is no evidence tending to show that the injuries complained of resulted from extraordinary or accidental circumstances, and no evidence tending to show that the defendant had any right, by grant, permission, or prescription, to allow the rain falling upon his building to be discharged from the eaves thereof upon the adjoining building, *held*, that the following portions of the charge given to the jury are misleading, and in a very close case, sufficient ground for reversing the judgment rendered against the plaintiff, namely: "The defendant is liable for all the consequences resulting from such defects or acts, unless the same resulted from extraordinary or accidental circumstances;" and "a party has no right to make any erections on his premises and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, except upon or by express grant or permission, or else by prescription for such length of time as furnishes a presumption of a grant so to do, which is usually for a term of years—twenty years or more for prescription, but if by permission or grant, no particular length of time is required." *Hazeltine v. Edgmand*..... 202, 208
2. *Damages; Erroneous Instruction.* In an action against a railroad company to recover for personal injuries where the plaintiff specifically alleged that the injury was caused by the negligence of his coëmployé, the engineer of the train, and no other basis of recovery was stated, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that the plaintiff might recover if the injury was caused by the negligence of the fireman. *A. T. & S. F. Rld. Co. v. Irwin*..... 286, 287
3. *Charge of Court, How Considered.* The charge of the court is to be considered as an entirety, and if, when so considered, it correctly states the law, the mere misuse of a word in one part of the charge, which it appears could not have misled the jury, will not warrant a reversal. *The State v. Miller*..... 329

INSTRUCTIONS — CONTINUED:

4. *Erroneous Instruction.* In an action brought by an employé against a railroad company for injuries resulting from alleged negligence, evidence was introduced tending to show that a duty was imposed by the railroad company upon such employé, and afterward another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time, and evidence was also introduced tending to show that he might have performed both duties by attending to one and then to the other alternately, and that he failed in the performance of one of such duties, and that by reason of such failure the injury for which he sued the railroad company resulted. *Held*, That an instruction by the court to the jury in substance that, if at the time of the injury the plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous. *U. P. Rly. Co. v. Fray*..... 700
5. *Erroneous Instruction.* Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that "in case no evidence can be found bearing upon the question required to be answered, the jury will say 'Don't know,' or 'Cannot answer from the evidence.'" And in such a case, where the jury answer eight of such questions by simply saying "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held*, error. *Id.*..... 700
6. *Instruction, Not Applicable to Facts.* An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in evidence. *The State v. Whitaker*..... 781
7. *Erroneous Instruction.* Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury, not warranted by the facts in evidence, is erroneous; and unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside. *Id.*, 731

INSUFFICIENT COMPLAINT — SEE "CRIMINAL LAW," 30.

INSURANCE:

1. *Corporation, Subject to Supervision by the State.* The declared purpose of the defendant corporation is the promotion of charity, as well as the social and moral advancement of its members, who are classified as social and beneficiary members. The expenses of the association are paid, and a charity and beneficiary fund is created, from membership fees, contributions and assessments; but the social members are not required to pay assessments, or to contribute to the charity and beneficiary fund, and are not entitled to any benefit therefrom. The main object of the association is to enter into contracts with its beneficiary members, by which the member agrees to comply with the rules of the association, to pay a membership fee of ten dollars, and an assessment of one dollar upon the death

INSURANCE — CONTINUED:

- or permanent disability of any other beneficiary member of the section to which he belongs; in consideration of which, the association agrees that upon the death or permanent disability of such member, it will levy an assessment upon the other beneficiary members, and that seventy-five per cent. of the amount collected upon such assessment shall be paid to the beneficiary named in the certificate of such member, provided it does not exceed the sum agreed upon and stated in the certificate. *Held*, That the business done between the defendant and its beneficiary members is that of mutual life insurance on the assessment plan, and that the defendant is subject to the supervision of the superintendent of insurance, and to the provisions of chapter 131 of the Laws of 1885. *The State, ex. rel., v. National Association*..... 51
2. *Excepted Associations*. That provision of the act providing for the organization and control of mutual life insurance associations which excepts from its operation an association "under the supervision of a grand or supreme lodge," refers only to secret associations, such as Freemasons, Odd Fellows, and the like. *Id.*..... 21
3. Chapter 131 of the Laws of 1885 is not unconstitutional, or void. *Endowment and Benevolent Association v. The State*..... 253
4. *Life Insurance—Endowments—Benefits*. A contract by an association to pay at certain stated periods of time certain sums of money as endowments to living members, or in case of their death to pay certain other sums of money as benefits to their beneficiaries, is life insurance both as to the endowments and the benefits. *Id.*..... 253
- See "CRIMINAL LAW," 19, 20.

INTENT—SEE "CRIMINAL LAW," 24.

INTEREST—SEE "DAMAGES," 6, 8; "RAILROADS, AND RAILROAD COMPANIES," 14, 17; "TAXES, AND TAXATION," 12, 17, 19, 23.

INTOXICATING LIQUOR—SEE "CRIMINAL LAW," 6, 7, 8, 9, 10, 11, 21, 28, 29.

INVOLUNTARY SERVITUDE—SEE "CONSTITUTIONAL LAW," 6.

IRREGULARITY—SEE "SHERIFF'S SALE," 2, 3; "TAXES, AND TAXATION," 13, 14.

J.

JOINT LIABILITY—SEE "PLEADING AND PRACTICE," 13, 14, 15.

JUDGMENT:

1. *Reversal of Judgment, Various Grounds Alleged for; No Material Error*. Where the defendants in a criminal prosecution appeal to the supreme court and ask for a reversal of the judgment of the court below for incompetency of their own counsel; neglect and failure on the part of the court below to protect their rights and interests; incompetency of the evidence against them; leading questions; erroneous and misleading instructions; insufficiency of the evidence for conviction, it being in part the evidence of an accomplice; the alleged hearing of a motion for a new trial in the absence of the defendants; and

JUDGMENT—CONTINUED:

- the refusal to grant a new trial on the ground of alleged newly-discovered evidence, *held*, under the circumstances of the case, that no material error was committed by the court below, and that the judgment cannot be reversed. *The State v. Holden*. . . . 31
2. *Limit of Review in Supreme Court.* Where no case was made for the supreme court, nor any extension of time given for that purpose, within three days after the judgment was rendered, and the case was not brought to the supreme court within one year after the judgment was rendered, the supreme court cannot review such judgment or any ruling involved therein, or made prior thereto, except so far as such judgment or ruling may be involved in some subsequent ruling properly reviewable by the supreme court, as, for instance, a subsequent ruling on a motion for a new trial. *Dyal v. City of Topeka*. . . 62
3. *Mortgage, Merged into Judgment; Subsequent Taxes.* Where a mortgage of real estate is merged into a judgment, which includes all the taxes due upon the land at the date of its rendition, the payment by the judgment creditor of taxes accruing on the premises after the judgment will not constitute a separate and independent lien on the land, which can be enforced by action, after the judgment debtor has satisfied the judgment, interest, and costs. *McCrosen v. Harris*. . . . 178
4. *Pennsylvania Judgment, When Enforced in Kansas.* Under the laws of Pennsylvania, as they are shown to be by the parol and statutory evidence introduced on the trial, a valid personal judgment may be rendered in the state of Pennsylvania by the clerk of the court, or prothonotary, in vacation, upon a penal bond and a written confession of judgment, for the full amount of the penalty, without summons or pleadings, but merely upon the request of the obligee of the bond; and such judgment will be enforced in Kansas to the extent of the actual damages suffered by the obligee. *Ritter v. Hoffman*. . . . 215
5. *Judgment, Confessed in Pennsylvania.* Under the evidence in the case, an instrument in writing confessing judgment, executed in Pennsylvania and by a resident of that state, gives to the courts of Pennsylvania such jurisdiction over the person of the defendant that a valid personal judgment, enforceable in another state, may be rendered against him merely upon his written confession and the request of the holder of the instrument; and this without summons or pleadings or appearance by the defendant, and by the clerk of the court, or prothonotary, in vacation, and although the defendant may at the time of the rendition of the judgment be absent from the state of Pennsylvania and a resident of another state. *Id.*. . . . 215
6. *Foreign Judgment—When Enforceable, When Not.* A judgment rendered and entered in a state other than Kansas in accordance with the laws of such other state and valid there, may be valid and enforceable in Kansas, although a judgment rendered and entered in the same manner and form and under like circumstances in Kansas, would be utterly void. *Id.*. . . . 215, 216
7. *Joint Injury; Liability; Satisfaction; Bar.* Where several persons jointly commit an injury, the liability is joint and several, and the party injured may sue all of them in a single action, or he may sue them separately at the same time; but although several judgments may thus be obtained, there can be but one

JUDGMENT—CONTINUED:

- satisfaction, and the acceptance of payment in full upon the judgment obtained against one of such persons will operate as a bar to the further prosecution of actions for the same injury against any of the others. *Westbrook v. Mize*..... 299
8. *Several Judgments; Payment of One before Sale.* Where a sheriff's sale is made to satisfy the judgments of several judgment creditors, and the judgment of one of such creditors has previously been paid, but the amount for which the property was sold is not enough to satisfy the other judgments, *held*, that the fact that one of the judgments had previously been paid, will not of itself render the sale void or voidable; but the judgment creditor whose judgment has been paid should not be allowed to receive any portion of the proceeds of the sale. *Capital Bank v. Huntton*..... 578
9. *Execution; Judgment, When Not Dormant.* Where an action was commenced by a judgment creditor against the judgment debtor to subject certain property to the payment of the debts of such judgment debtor, and another judgment creditor was made a party to the suit within less than five years after such second judgment creditor's judgment was rendered, and in the above-mentioned action judgment was finally rendered in favor of both the judgment creditors and against the judgment debtor, and an execution was issued thereon within less than five years after this last-mentioned judgment was rendered but more than five years after an execution had been issued in favor of the second judgment creditor on his first judgment, and the property was sold on such execution, *held*, that the judgment of the second judgment creditor is not dormant to the extent of depriving him of participating in the proceeds of the sheriff's sale. *Id.*.....578, 579
10. *Entire Judgment, Suspended by Appeal.* The defendant was convicted first before a police judge, and afterward in the district court, for violating an ordinance of a city of the third class, and he then appealed to the supreme court. The sentence was that "he should pay a fine and the costs of suit, and that he stand committed to the jail of the county until the amount of said fine and costs shall be paid." *Held*, That the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court. *City of Miltonvale v. Lanoue*..... 608
11. *Action, Prematurely Brought; Judgment, No Bar.* Where an action to foreclose a lien for materials furnished for a building is prematurely brought, and the judgment is rendered in the case against the plaintiff for that reason, *held*, that such judgment is not a bar to another action brought subsequently and within proper time against the same parties to foreclose the same lien. *Seaton v. Hixon*..... 668

JUDICIAL NOTICE—SEE "COURTS," 3.

JURISDICTION:

1. *Justice of the Peace; Limit of Jurisdiction.* The jurisdiction of a justice of the peace is limited in civil actions to the county in which he resides, and for which he has been elected; and where an action is brought before him and service obtained

JURISDICTION — CONTINUED:

upon one defendant, he has no authority to issue a summons in such action to an officer of another county, there to be served upon another defendant. *The State, ex rel., v. Brayman*..... 714

2. *Summons to Another County.* The provisions of the civil code authorizing the issuance of a summons to a county other than the one in which the action is brought, are not applicable to proceedings before a justice of the peace. *Id.*..... 714
See "PRACTICE, SUPREME COURT," 16.

JURY:

1. *Mortgage; Foreclosure.* A jury trial cannot be demanded as a matter of right in an action to recover upon a promissory note, and to foreclose a mortgage executed to secure the same where the pleadings admit the right to recover the amount claimed to be due upon the note, and nothing is left in controversy but the right to foreclose the mortgage, and to subject the property mortgaged to the payment of the amount admitted to be due. *Morgan v. Field*..... 162
2. *Challenge to Array.* Where twenty-six persons are summoned to appear as the regular panel of petit jurors, and it is affirmatively shown on the part of the defendant on trial for a misdemeanor that two or three of the panel are not eligible to be returned on the jury list, *held*, that the court has ample power to purge the jury without sustaining a challenge to the array; and *held*, further, that in such a case there has not been such a palpable disregard of the statute in selecting and drawing the regular panel of jurors as to require a challenge to the array to be sustained. *The State v. Whisner*..... 272
3. *Conduct.* The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial when it is not shown that the jurors read any part of what was written in such transcript. *The State v. Müller*..... 329
4. *Railroad Employé—Two Duties Imposed; Question of Fact.* Where a duty is imposed by a railroad company upon one of its employés, and afterward another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty, is a question of fact to be submitted to the jury upon the evidence, and is not a question of law. *U. P. Rly. Co. v. Fray*..... 700
5. *Erroneous Instruction.* Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that "in case no evidence can be found bearing upon the question required to be answered, the jury will say 'Don't know,' or 'Cannot answer from the evidence.'" *Id.*..... 700
6. *Questions, Not Answered; Error.* And in such a case, where the jury answer eight of such questions by simply saying "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held*, error. *Id.*..... 700

JURY TRIAL—SEE "JURY."

JUSTICES, AND JUSTICES' COURTS:

1. *Continuance; Correction of Mistake in Entry.* A cause pending before a justice of the peace was continued upon the application of one of the parties until January 16, but by mistake the justice made an entry upon his docket that it had been continued until January 15th, and as the plaintiff did not appear on that day, he made an order dismissing the cause. On January 16th the plaintiff appeared, and, after notice to the defendant, procured an order setting aside the judgment of dismissal. *Held*, That the rulings of the justice in correcting his record and setting aside the order of dismissal made before the case was triable, and proceeding with its trial upon the day to which it had been adjourned, was not error. *Petrie v. Karsch*, 357
2. *Errors of Fact, Seldom Considered.* Questions with regard to the assignments of errors of fact, alleged to have been committed by a justice of the peace, discussed, and *held*, that such assignments of error can seldom if ever be considered. *Krueger v. Beckham*..... 400
3. *Confession of Judgment; Waiver of Irregularity.* Where a justice of the peace left his office and went to the defendant's residence, which was in the same township, and there the defendant waived summons, confessed judgment, and swore to the necessary affidavit therefor, and the justice then returned to his office, where he made the proper entries of the proceedings, *held*, that such judgment is neither void nor voidable; that the defendant, when she waived the summons, confessed the judgment, etc., waived the irregularity of the justice's taking the confession of the judgment at a place other than his office. *Id.*..... 400
4. *Limit of Jurisdiction.* The jurisdiction of a justice of the peace is limited in civil actions to the county in which he resides, and for which he has been elected; and where an action is brought before him and service obtained upon one defendant, he has no authority to issue a summons in such action to an officer of another county, there to be served upon another defendant. *The State, ex rel., v. Brayman*..... 714
5. *Summons to Another County.* The provisions of the civil code authorizing the issuance of a summons to a county other than the one in which the action is brought, are not applicable to proceedings before a justice of the peace. *Id.*..... 714

JUSTICES OF THE PEACE—SEE "ATTACHMENT," 2; "OFFICE, AND OFFICER," 2.

L.

LACHES—SEE "SHERIFF'S SALE," 12.

LARCENY—SEE "CRIMINAL LAW," 39.

LATERAL SUPPORT—SEE "POSSESSION," 2.

LAWS—SEE "LEGISLATURE."

LEASE—SEE "RAILROADS, AND RAILROAD COMPANIES," 15, 16.

LEGISLATURE:

1. *Approved Laws, Deposit of.* The governor of the state is required by the statute to cause all bills or acts, which have become laws by his approval, to be deposited in the office of the secretary of state without delay. *The State v. Whisner*..... 272
2. *Message, Approving Act.* There is no constitutional or statutory law which requires the governor to return to either house of the legislature any bill or act after it has received his approval and signature, and if the governor reports to the house of representatives his approval of a bill, it is simply a matter of courtesy only. *Id.*..... 273
3. *Act, Unaffected by Subsequent Message.* After an act of the legislature has, in a regular and constitutional mode, passed both branches thereof and has been properly signed by the officers of both houses, and has been regularly presented to the governor for his approval, and he has approved and signed the same without any mistake, inadvertence, or fraud, and thereafter has voluntarily deposited it with the secretary of state, as a law of the state, it has passed beyond his control; its status as a law has then become fixed and unalterable, so far as he is concerned, and any subsequent message by him to the house of representatives, notifying that body of his approval of the act, but setting forth his objections to certain provisions of the act, and giving his construction thereof, does not qualify or otherwise affect the act, or the validity of his approval. *Id.*... 272
4. *Curative Statute.* Where an irregularity rendering an act of a city or subordinate agency illegal or void is simply a failure to comply with some provision of the statutes, the compliance with which the legislature might in advance have dispensed with, the legislature can, by a general curative statute subsequently passed, dispense with such compliance and thereby render the act of the city or subordinate agency legal and valid. *Mason v. Spencer, County Clerk*..... 512
See "STATUTE."

LICENSE TAX—SEE "CITIES," 1; "TAXES, AND TAXATION," 1.

LIEN:

Growing Crop—Lien of Mortgage. After the foreclosure of a mortgage upon a tract of real estate, the mortgagor planted a crop of corn thereon, which was immature and growing when the land was sold pursuant to the decree of foreclosure. One day before the sale of the land, the mortgagor sold the corn to another, who claimed the same as against the purchaser of the land. *Held*, That the lien of the mortgage and decree of foreclosure attached to the growing crop as well as to the land, and that the purchaser of the land under the decree will be entitled to the growing and unsevered crop in preference to the vendee of the mortgagor, unless there was a reservation of the crop, or unless the purchaser had waived his right to claim the same. *Beckman v. Sikes*..... 120

LIFE INSURANCE—SEE "INSURANCE."

LIMITATION OF ACTIONS:

1. *Tax Deed, Not Absolutely Void.* Where a person owns a tax-sale certificate and is entitled to have a valid tax deed executed thereon, but such person is at the time the county clerk of the county in which the tax deed is to be executed, and such person as county clerk executes the tax deed to himself as an individual, and the tax deed is immediately recorded, *held*, that it is not absolutely void, and that after the statute of limitations relating to tax deeds has completely run in its favor, it will be valid and not even voidable. *Barr v. Randall*..... 126
2. *Beginning of Prosecution.* The mere filing of a complaint before a magistrate charging the commission of a felony upon which no warrant is issued nor arrest made, is not such a commencement of the prosecution as will take the case out of the operation of the statute of limitations. *In re Griffith, Petitioner*.... 377
3. Imprisonment in the state penitentiary does not fall within any of the exceptions of the limitations upon criminal prosecutions; and therefore the time of imprisonment of the accused within the state, which passes before a prosecution is begun, cannot be excluded from the statutory period of limitation. *Id.*, 377
4. *Redemption List, Not Posted; Tax Deed.* The posting up of the redemption list and notice required by the provisions of § 137 of said chapter 107 cannot be omitted, and if omitted, the failure to comply with the provisions of the statute in that regard will be fatal to the tax deed, if challenged before the statute of limitations has full operation thereon. *Stout v. Coates, Assignee*, 382
5. *New Action, Not Barred.* And where the plaintiff commenced his second action within less than one year after his failure in the first action, though more than one year after the building was completed, *held*, that by virtue of the provisions of § 23 of the civil code, the action is not barred by the one-year limitation prescribed by § 4 of the mechanics-lien law. *Seaton v. Hixon*..... 663

M.

MANDAMUS—SEE "PRACTICE, SUPREME COURT," 16.

MANUMISSION—SEE "PARENT AND CHILD."

MASTER AND SERVANT—SEE "RAILROADS, AND RAILROAD COMPANIES," 21, 22, 29, 32, 33, 36, 38, 39, 40.

MEASURE OF RECOVERY—SEE "DAMAGES," 6, 7, 10, 11.

MECHANICS' LIEN:

1. *Action, Prematurely Brought; Judgment, No Bar.* Where an action to foreclose a lien for materials furnished for a building is prematurely brought, and the judgment is rendered in the case against the plaintiff for that reason, *held*, that such judgment is not a bar to another action brought subsequently and within proper time against the same parties to foreclose the same lien. *Seaton v. Hixon*..... 663
2. *New Action, Not Barred.* And where the plaintiff commenced his second action within less than one year after his failure in the first action, though more than one year after the building

MECHANICS' LIEN—CONTINUED:

was completed, *held*, that by virtue of the provisions of § 23 of the civil code, the action is not barred by the one-year limitation prescribed by § 4 of the mechanics-lien law. *Id.* 663

3. *Sufficient Description of Real Estate.* Where a description of real estate is true in every particular, and no other property answers to such description, and the property may easily be found by anyone who may be acquainted with such description and with the facts which exist and which may easily be ascertained upon inquiry, *held*, that the description is sufficient; and *further held*, that the description in the present case is sufficient. *Id.*... 668

MEDICAL SERVICES FOR PRISONERS—SEE "COUNTIES, AND COUNTY OFFICERS," 5.**MINOR—SEE "PARENT AND CHILD;" "RAILROADS, AND RAILROAD COMPANIES," 11.****MINOR OWNER—SEE "TAXES, AND TAXATION," 19.****MISDEMEANOR—SEE "CRIMINAL LAW."****MORTGAGE:**

1. *Growing Crop.* After the foreclosure of a mortgage upon a tract of real estate, the mortgagor planted a crop of corn thereon, which was immature and growing when the land was sold pursuant to the decree of foreclosure. One day before the sale of the land the mortgagor sold the corn to another, who claimed the same as against the purchaser of the land. *Held*, That the lien of the mortgage and decree of foreclosure attached to the growing crop as well as to the land, and that the purchaser of the land under the decree will be entitled to the growing and unsevered crop in preference to the vendee of the mortgagor, unless there was a reservation of the crop, or unless the purchaser had waived his right to claim the same. *Beckman v. Sikes*..... 120
2. *Foreclosure; Jury Trial.* A jury trial cannot be demanded as a matter of right in an action to recover upon a promissory note, and to foreclose a mortgage executed to secure the same, where the pleadings admit the right to recover the amount claimed to be due upon the note, and nothing is left in controversy but the right to foreclose the mortgage, and to subject the property mortgaged to the payment of the amount admitted to be due. *Morgan v. Field*..... 162
3. *Equitable Title—Sale to Satisfy Mortgage.* Where the mere nominal and legal title to a tract of land is conveyed without consideration, and with the intention and understanding that the real title and interest thereto shall remain in the grantor, who, for a period of more than eight years thereafter, and until his death, continued in possession and cultivated and treated it as his own, paying the taxes, and making valuable and lasting improvements thereon; and the grantee, although living in the immediate vicinity, made no claim to the possession of the land, or to the rents and profits of the same, and did not pretend to own or to exercise any supervision or control over it until after the death of the grantor: *Held*, That the full equitable title to the land was in the grantor at the time of his death, and that the same may be sold to satisfy a mortgage previously given thereon by such grantor. *Id.*..... 162

MORTGAGE—CONTINUED:

4. *Mortgage, Merged into Judgment; Subsequent Taxes.* Where a mortgage of real estate is merged into a judgment, which includes all the taxes due upon the land at the date of its rendition, the payment by the judgment creditor of taxes accruing on the premises after the judgment will not constitute a separate and independent lien on the land, which can be enforced by action, after the judgment debtor has satisfied the judgment, interest and costs. *McCrosen v. Harris*..... 178
5. *Stranger Paying Debt; Subrogation.* Where a stranger, a mere volunteer, a mere intermeddler, pays the debt of another, he cannot be subrogated to the rights of the creditor. But where a person pays a debt, which is secured by a mortgage, at the instance and request of the debtor, with the agreement that the person paying the debt shall have a mortgage lien upon the real estate then mortgaged to secure such debt, and a new mortgage is given but is void, the party furnishing the money may be subrogated to the rights of the original creditor. *Crippen v. Chappel*..... 495
6. *Administrator; Subrogation.* And this rule applies where an administrator borrows money to pay a debt of his intestate's estate. In other words, where a debt is due against the estate of a deceased person, and such debt is secured by a mortgage on the real estate of such deceased person, and the administrator whose duty it is to pay such debt borrows the money therefor from a third person, with the agreement and understanding between them that such third person shall be reimbursed from the assets of the estate, and such third person shall be secured by a mortgage lien upon the previously-mortgaged property of such estate, and for that purpose a mortgage on the previously-mortgaged property is executed by the administrator to such third person, which mortgage is void because of a want of power in the administrator to execute the same, but in pursuance of such mortgage and with the agreement and understanding between the administrator and the loaner of the money, the money is loaned and is paid to the original mortgagee, *held*, that such third person may then be subrogated to the rights of the original mortgagee. *Id.*..... 495

See "PLEADING AND PRACTICE," 32.

MORTGAGE LIEN—SEE "MORTGAGE."

MUNICIPAL BONDS—SEE "COUNTIES, AND COUNTY OFFICERS," 1, 2; **"RAILROADS, AND RAILROAD COMPANIES,"** 6, 7, 14, 17.

MURDER—SEE "CRIMINAL LAW," 12, 40, 41.

N.

NATIONAL BANK—SEE "BANK."

NEGLIGENCE—SEE "CITIES," 5, 6, 7; **"DAMAGES,"** 3, 4, 5, 9; **"FINDINGS,"** 2, 3; **"RAILROADS, AND RAILROAD COMPANIES,"** 5, 9, 11, 20, 21, 22, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 38, 42, 43, 44.

NEW TRIAL:

1. *Former Conviction, No Bar.* When the defendant, charged with murder, was convicted of manslaughter in the fourth degree, and thereupon moved for and obtained a new trial, he thereby placed himself in the same position as if no trial had been had, and the conviction for manslaughter in the fourth degree was no bar to a subsequent conviction of a higher degree of the offense charged. *The State v. Miller*. 329
2. *Jury; Conduct.* The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial when it is not shown that the jurors read any part of what was written in such transcript. *Id.* 329
3. *Petition in Error, Filed in Time for Review.* Where a petition in error is filed in the supreme court within one year after the making of an order overruling a motion for a new trial, the proceeding is in time for a review of all the rulings of the court made during the trial, and excepted to at the time, which are referred to in such motion. *Bates v. Lyman*. 684
 See "CRIMINAL LAW," 32; "EVIDENCE," 19, 20; "PRACTICE, SUPREME COURT," 8, 15.

NOTARY PUBLIC—SEE "CONVEYANCE," 1, 3.

NOTICE:

1. Where notice of the tax sale was properly given and proper proof thereof made, and the notice and proof were properly filed as required by law, but such notice and proof were afterward lost or destroyed and were not on file in the proper office, *held*, that such loss or destruction does not render the tax sale void. *Davis v. Harrington*. 196
2. *Attorney's Lien.* Where an attorney, who is a member of a law firm composed of three persons, receives from a railway company a draft to deliver to a third person in the settlement of a law suit, and in such suit none of the members of the firm represented the railway company, or had anything to do with the case, a notice of an attorney's lien served upon the members of the firm, other than the one who actually received the draft, will not be notice upon the attorney receiving the draft, or make such attorney receiving the draft chargeable with negligence in delivering the draft according to his instructions, before the attorney serving notice of his lien has been paid or satisfied. *St. L. & S. F. Rly. Co. v. Bennett*. 395
3. In the case stated, *held*, that in an action brought by the grantee of the purchaser at the sheriff's sale to quiet his title to the lot, that the return first made by the sheriff on the execution was not conclusive, and might be amended conformably to the facts upon the application of the purchaser, officer, or either of the parties to the action; and that as the application to amend was made prior to the confirmation of the sale, no new or additional notice to the defendant in the execution was necessary; and *held, further*, that the judgment and execution being valid, the sheriff's deed could not be attacked nor the proceedings impeached, in a collateral action. *Stetson v. Freeman*. 523

NOTICE—CONTINUED:

4. *Fraudulent Sale; Title of Purchaser.* Where an insolvent and failing merchant makes a sale of all of his goods and merchandise for the purpose of defrauding his creditors, no one but a purchaser for a valuable consideration actually passed before notice of the fraud can, as against attaching creditors, claim title to the property which has been fraudulently disposed of. *Bush, Sheriff, v. Collins* 535
 5. *Purchaser, Protected to What Extent.* Where a party purchases from an insolvent and failing merchant a stock of goods, and the merchant makes such sale with the purpose to defraud his creditors, and the purchaser thereof has no actual or constructive notice of the fraud at the time of his purchase, but subsequently and before the payment of all the consideration of his purchase has actual notice thereof, he can only be protected to the extent of the money actually paid, or the security or property actually appropriated by way of payment before notice. If notice of the fraud is after payment of a part of the purchase-money, the purchaser is only entitled to reimbursement for the money paid or the security or property actually appropriated by the seller as payment. He is not to be regarded as a purchaser for a valuable consideration as to purchase-money not paid. *Id.* 535
 6. *Tax Sale; Defective Notice; Voidable Deed.* A tax-sale certificate and tax deed assigned and issued under the provisions of chapter 43, Laws of 1879, depend for their validity upon the regularity of the anterior tax proceedings, and upon the sale which was made when the land was bid in by the county; and the omission to state in the notice of such sale that the land would be sold at public auction, is a defect which renders the tax deed voidable. *Hoffman v. Groll* 652
- See "AGENCY," 4; "BRIDGE," 2; "CONTRACT," 9, 10, 11;
"FRAUD," 3, 7, 8; "INJUNCTION," 1, 2.

NUISANCE—SEE "CRIMINAL LAW," 30; "INJUNCTION," 3.

O.

OBLIGATION—SEE "GARNISHMENT," 3.

OCCUPYING CLAIMANT—SEE "EJECTMENT;" "TAXES, AND TAXATION," 18.

OCCUPYING-CLAIMANT LAW—SEE "PRACTICE, DISTRICT COURT," 6, 10.

OFFICE, AND OFFICER:

1. *Probate Judge—No Forfeiture of Office.* The duties imposed upon a probate judge by the provisions of § 3, chapter 8, Special Session Laws of 1874, concerning the examination and counting of the funds in the hands of a county treasurer, are distinct from the duties pertaining to the judicial office, and are somewhat in the nature of a new office. Therefore the right of a probate judge to enjoy the powers and emoluments of his office as probate judge does not depend upon a faithful discharge of the duties so imposed by said statute; and if he fails

OFFICE, AND OFFICER — CONTINUED:

- or neglects to make the examination and count required by the statute, he does not thereby forfeit his office as probate judge. *The State, ex rel., v. Brown, Probate Judge*..... 167
2. *Justice of the Peace; Election to Fill Vacancy.* The governor appointed the defendant, in August, 1885, to fill a vacancy in the office of justice of the peace of the city of Topeka. The plaintiff was voted for and claimed to have been elected to fill such vacancy at the general election held in November, 1885. *Held*, That the vacancy could not be filled by an election before the regular city election held in April, 1886, to which time the defendant was entitled to hold the office under the appointment of the governor, and until his successor then chosen had qualified. *Ward v. Clark*..... 315
3. *Official Letter—Evidence.* The copy of an official letter received by the register or receiver of any land office of the United States from any department of the government of the United States, that has been duly certified by the register or receiver having the custody of such letter, is admissible in evidence the same as the original; and where the official character of the letter is apparent upon its face, it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter. *Darcy v. McCarthy*..... 723
4. *Land Office; Erroneous Entry, Canceled; Presumption.* The commissioner of the general land office has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions; and where an erroneous entry made by the register and receiver was canceled by the commissioner, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence. *Id.*..... 723
- See "ELECTION," 1,

OFFICIAL LETTER—SEE "EVIDENCE," 26.

ORDER OF ARREST:

- Bail, When Exonerated.* The bail in an undertaking for a defendant arrested in a civil action, executed under § 159 of the civil code, is exonerated if the order of arrest is erroneously vacated by the district court or the judge thereof on account of the alleged insufficiency of the affidavit upon which the order is issued, and no stay of the order of vacation is granted, as the right to arrest or surrender the defendant given by the statute to the bail as their security is taken away by such vacation and discharge. *Baker Mfg. Co. v. Fisher*..... 659

P.

PARENT AND CHILD:

- Minor Child—Manumission.* In a suit to recover damages for the death of a minor under § 422 of the code, the fact that the parents had released to such minor his time and services during his minority, may properly be considered by the jury in determining the amount of recovery, but it will not prevent the parents from recovering any pecuniary damages, such as the loss of support, that they may be able to prove resulted from his death. *St. J. & W. Rld. Co. v. Wheeler*..... 185

PARTITION:

1. *Apportionment of Costs.* The plaintiff owned two-elevenths of a certain city lot, not including the enhanced value of the lot by reason of a building thereon, and the defendants owned the other nine-elevenths of the lot, and were also entitled to the enhanced value thereof by reason of said building. The plaintiff's interest in the entire property with respect to the defendants' interest was as 48 is to 997. *Held*, In an action for partition, that under § 628 of the civil code, the costs, attorney's fees and expenses should be apportioned between the parties according to their respective interests in the entire property. *Sarbach v. Newell* 180
2. *Sale; Distribution of Proceeds.* In such action, where the property could not be partitioned without manifest injury thereto, but was sold, *held*, in pursuance of the foregoing statute and the decision of the supreme court formerly made in the case, (*Sarbach v. Newell*, 30 Kas. 102, 104,) that out of the proceeds of the sale, the costs, attorney's fees and expenses should first be paid, and then that the remainder of the proceeds should be divided between the parties according to their respective interests in the property. *Id* 181

PARTNERSHIP—SEE "RAILROADS, AND RAILROAD COMPANIES," 44.

PART PAYMENT—SEE "CONTRACT," 12; "ESTOPPEL," 3.

PASSENGER—SEE "RAILROADS, AND RAILROAD COMPANIES," 9, 10, 11, 19.

PATENT—SEE "HOMESTEAD," 3.

PENAL BOND:

1. *Sum Named, a Penalty.* Where H. sells his business and goodwill to G., and as a part of the same transaction executes a written instrument in which he says: "I, —, bind myself in the sum of \$500" that I will not engage in such business at the same place for the period of five years, *held*, that the sum named in the instrument is a penalty, and not liquidated damages; and for a breach of the agreement by H., G. may recover only his actual damages. *Heatwole v. Gorrell* 692
2. *Fixed Sum, When a Penalty, and not Liquidated Damages.* Whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that may occur, or the amount of the damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages. *Id.* 692, 698

PENALTY—SEE "PENAL BOND."

PENNSYLVANIA JUDGMENT—SEE "JUDGMENT," 4, 5.

✓ **PERMIT**—SEE "CRIMINAL LAW," 6, 8, 9, 10, 21, 28, 29; "INTOXICATING LIQUOR."

PETITION IN ERROR—SEE "PRACTICE, SUPREME COURT," 15.

PHYSICIAN—*SEE* "CONTRACT," 6; "RAILROADS, AND RAILROAD COMPANIES," 19.

PLEADING AND PRACTICE:

1. *Cross-Examination, No Material Error in Limiting.* While it is proper for a court to permit a party, on cross-examining the witness of the adverse party, to put questions to the witness, the answers to which may tend to show bias or prejudice toward the party conducting the cross-examination, yet, where many such questions have been asked and answered, and the exact relations and feelings existing between the witness and the party conducting the cross-examination have been shown, the court may not commit material error in refusing to permit further questions for the same purpose to be asked; and *held*, in the present case, that no material error was committed in this respect. *Clark v. Phelps* 43
2. Other matters considered, and *held*, that the court did not commit material error with reference thereto. *Id.* 43
3. *Impeaching Evidence; No Material Error.* The plaintiff introduced evidence for the purpose of impeaching the testimony of one of the witnesses for the defendant, and in doing so introduced some evidence that could not have been introduced in any other manner, and might have been left out of the case entirely; but *held*, under the circumstances of the case, that the court did not commit material and reversible error. *Id.* 43
4. *Recovery of Land; Judgment; Costs.* In an action for the recovery of twenty-six acres of real property, in which judgment is rendered in favor of the plaintiff for two acres thereof, the plaintiff is entitled to recover all his costs. *Meskimen v. Day*... 46
5. *Unliquidated Damages, When a Set-Off.* Unliquidated damages arising from contract may constitute a set-off against a note secured by a chattel mortgage; and if such unliquidated damages exceed the mortgage debt, the mortgagee is not entitled to the possession of the property described in the mortgage, as against the mortgagor, asserting such unliquidated damages and pleading the same in an action founded upon the note and mortgage. *Gardner v. Risher* 93
6. *Set-Off, Not Defeated by Assignment.* When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other a set-off could have been set up, neither can be deprived of the benefit of such set-off by the assignment of the other. *Id.* 93
7. *Answer, Construed; Unnecessary Reply.* In an action upon a forfeited recognizance the defendant, by a verified answer, averred that he signed the instrument when it was yet incomplete and what is commonly known as a blank recognizance, the blank spaces left therein for the name of the county, the offense charged, the amount in which the prisoner was held, and the court before which he was required to appear, being left unfilled; and that he attached his name to it upon the condition that another person should join him in signing the recognizance, and when so signed, the blanks should be filled out by the co-surety and the instrument delivered; and that unless it was so executed he was not to become liable thereon. He also alleged that the recognizance was not signed or completed by the other party, and therefore that he was not liable thereon.

PLEADING AND PRACTICE—CONTINUED:

- Held*, That this answer was in substance and effect a denial that the recognizance sued on had been executed by him, and a verified reply by the plaintiff denying the allegations of the answer was unnecessary. *Madden v. The State*..... 146, 147
8. *Injunction; Void Order*. Where an injunction is granted at the commencement of an action by a district judge, without notice or appearance by the defendants, and no undertaking is furnished by the plaintiff, and no summons is issued, but the district clerk issues an alleged order of injunction forbidding the defendants from doing certain acts not recited or referred to in the petition, *held*, such order has no operation, and is wholly void, and may be disregarded by anyone. *The State, ex rel., v. Comm'rs of Rush Co*..... 150
9. *Injunction—When Granted, When Not; Notice*. The statute expressly provides, if a court or judge deem it proper that the defendant, or any party to the suit, shall be heard before granting a temporary injunction prayed for, that reasonable notice may be given to such party, and in the meantime a restraining order may be issued; therefore, a court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions, without notice, is not in accordance with a fair and orderly administration of justice. *A. T. & S. F. Rld. Co. v. Fletcher*..... 286, 287
10. *Argument, Waiver of Right to Make*. Where a case is tried before the court without a jury, and at the close of the evidence the plaintiff's counsel, in the hearing of the court, ask the defendant's counsel whether they desire to argue the case or not, stating that the plaintiff's counsel do not wish to do so, and the defendant's counsel, hearing the same, do not answer, and the court then renders its decision, which is adverse to the defendant, and the defendant's counsel except to the decision, and then ask the court to permit them to argue the case, and the court refuses, *held*, not error; that defendant's counsel, by their silence, waived their right to make an argument at that time or at any time prior to their argument on their motion for a new trial. *Piatt v. Head*..... 282
11. *Contract, Construed*. An allegation that the "plaintiff contracted with the defendant to cut and bind wheat for the defendant," is not an allegation that the plaintiff contracted with the defendant to cut and bind *all* the wheat which the defendant owned. *Ingraham v. Morris*..... 290
12. *Verdict, Not Set Aside*. Where the evidence is conflicting upon a given subject, but sufficient to sustain the verdict of the jury, the supreme court cannot set aside such verdict. *Id.*..... 290
13. *Joint Injury; Liability; Satisfaction; Bar*. Where several persons jointly commit an injury, the liability is joint and several, and the party injured may sue all of them in a single action, or he may sue them separately at the same time; but although several judgments may thus be obtained, there can be but one satisfaction, and the acceptance of payment in full upon the judgment obtained against one of such persons will operate as a bar to the further prosecution of actions for the same injury against any of the others. *Westbrook v. Mize*..... 299

PLEADING AND PRACTICE—CONTINUED:

14. *Damages—Measure of Recovery.* Although several separate suits may be brought for a joint liability, yet where the injury is an entirety, the damages resulting therefrom cannot be apportioned among the wrongdoers nor divided into separate demands; and where the injured party sues one of the wrongdoers and demands only a part of the damages which he suffered by the injury, a recovery and satisfaction therein will operate as a bar to any further claim of damages against the others. *Id.*..... 299, 300
15. *Costs, How Taxed.* In such a case, where separate suits are instituted against the wrongdoers, the plaintiff is entitled to the costs which had accrued in all of the cases up to the time when satisfaction is made in any one of them, but the defendants are entitled to recover the costs that may subsequently accrue in the other cases. *Id.*..... 300
16. *Damages.* In an action of replevin brought by a mortgagee of chattels, where the property remains in the hands of the defendant, and is sold by the defendant for more than the plaintiff's claim, with interest, and judgment is rendered in favor of the plaintiff, but only for his damages, and not for a return of the property, *held*, that he may recover as his damages the amount of his claim, with interest, although the petition was only an ordinary petition in replevin. *Dolan, Sheriff, v. Van Demark*..... 305
17. *Charge of Court, How Considered.* The charge of the court is to be considered as an entirety, and if, when so considered, it correctly states the law, the mere misuse of a word in one part of the charge, which it appears could not have misled the jury, will not warrant a reversal. *The State v. Miller*..... 329
18. *Justice's Court; Continuance; Correction of Mistake in Entry.* A cause pending before a justice of the peace was continued upon the application of one of the parties until January 16, but by mistake the justice made an entry upon his docket that it had been continued until January 15th, and as the plaintiff did not appear on that day, he made an order dismissing the cause. On January 16th the plaintiff appeared, and, after notice to the defendant, procured an order setting aside the judgment of dismissal. *Held*, That the rulings of the justice in correcting his record and setting aside the order of dismissal made before the case was triable, and proceeding with its trial upon the day to which it had been adjourned, was not error. *Petrie v. Karsch*..... 357
19. *Occupying-Claimant Law; Review.* The defeated occupant in an action for the recovery of real property is entitled to an investigation of his right under the occupying-claimant law upon a mere request, and error will not lie to the supreme court from a ruling of the district court, causing a journal entry of the request of the claimant to be made, and allowing an investigation of his claim to proceed. *Hazen v. Rounsaville*..... 405
20. *Removal to Federal Court.* A case cannot be removed from a state court to the federal courts under the act of congress of March 3, 1875, after a hearing has been had in the state court on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action. *St. L. & S. F. Rly. Co. v. Weaver*..... 412

PLEADING AND PRACTICE—CONTINUED:

21. *Burden of Proof.* The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant. *Id.*, 412
22. Common law, judicial notice of. *Id.*..... 412, 413
23. *Common Law, When to Govern; Presumption.* Where a cause of action involves as a question of fact what the common law of some other state is, it will be held that the common law of such other state is the same as that of Kansas, unless it is shown by the evidence to be otherwise; and when it is shown by the evidence to be otherwise, it will govern as it is thus shown to be. *Id.*..... 413
24. *Impeachment of Party's Own Witness.* The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and although the court may have committed slight error in the present case in permitting such an impeachment, yet under the circumstances of the case the supreme court cannot say that any material error was committed. *Id.*..... 413
25. *Promissory Note; Indorsement, Denied Under Oath.* In an action brought to recover upon a promissory note payable to order, by a party claiming to be the indorsee, the answer admitted the execution of the note, but denied the written indorsement thereon, by affidavit duly verified; it admitted, however, that the note had been transferred to the plaintiff, and the defense was that the transfer was made after maturity, and that there had been a total failure of consideration for the note. *Held*, The plaintiff is entitled to judgment as being the holder and in possession of the note, unless the defense of the failure of consideration is established; but *held further*, the plaintiff is not protected as a *bona fide* holder of the note so as to cut off the equities of the maker, in the absence of proof of the execution of the written indorsement denied under oath. *Savings Association v. Barber*..... 488
26. *Embezzlement; Waiver of Tort; Set-Off.* Where the agent or clerk of a principal is guilty of the embezzlement of his principal's goods, the principal may waive the tort if he chooses, and treat his cause of action against his agent or clerk as one arising upon an implied contract; and if the agent or clerk is the owner of a note executed by the principal, in an action thereon the principal may plead as a set-off to the note the value of his goods embezzled and converted to his own use by his agent or clerk. *Challiss v. Wylie*..... 506
27. *Set-Off, Striking Out, Not Material Error.* An action was brought by the wife of W. upon a promissory note payable to her order. The defendant alleged in his answer that the wife was not the real party in interest, but that the husband furnished the consideration of the note and was the owner thereof, and also alleged a set-off existing in favor of the defendant against the husband for a sum exceeding the amount of the note. Upon motion of the wife, the set-off was stricken out. The other allegations in the answer were permitted to stand. The case was tried by the court, without a jury, and the court found that the plaintiff was the real party in interest, and thereon rendered judgment against the defendant. *Held*, That although the district court committed error in striking out the set-off, the error, under the findings, cannot be said to be material, as

PLEADING AND PRACTICE.—CONTINUED:

- it did not affect or prejudice in any way the substantial rights of the defendant. *Id.*..... 506
28. *Sheriff's Sale; Irregularities, Cured; Matters, Not Cured.* Mere irregularities in the proceedings connected with a sheriff's sale are cured by the order of the court, made some considerable time afterward, confirming the sale; but matters which are not mere irregularities, or which form no part of the proceedings connected with the sale, as, for instance, fraudulent combinations which might prevent a fair and equitable sale, and matters relating to the ownership of the property sold, are not cured nor finally or conclusively determined by the order confirming the sale. *Capital Bank v. Huntoon.*..... 577
29. *Nuisance—Insufficient Complaint.* A complaint filed under § 319, of ch. 31, Comp. Laws of 1879, which charges the defendant with putting "the part of a carcass of any dead animal into any river, creek, pond, road, street, alley, lane, lot, field, meadow, or common," but which does not substantially allege that the act of the defendant complained of resulted to the injury of the health or to the annoyance of the citizens of the state, or any of them, is insufficient, and a motion to quash such complaint should be sustained. *The State v. Wahl.*..... 608
30. *Burden of Proof.* The burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. *Bates v. Lyman.*..... 634
31. *Burden of Proof on Defendant.* In an action brought to recover damages for breach of a written contract to deliver good merchantable corn, the plaintiff alleged and proved, and the defendant admitted, the payment of the money under the contract, and the non-delivery of the corn; the answer stated a tender of the amount and quality of the corn contracted for, and the plaintiff's refusal to accept it; the reply denied that any corn of the quality contracted for was tendered, and further alleged that the corn tendered by the defendant was light and damaged. *Held,* That the burden was upon the defendant to prove that the corn tendered by him was good merchantable corn, as he asserted the affirmative in his answer, that a tender of such corn had been made. *Id.*..... 634
32. *Mortgage; Foreclosure; Testing Tax Deed.* When a tax deed is set up in an action to foreclose a mortgage with a view of extinguishing the mortgage lien, the mortgagee has a right to question and have settled the validity of the tax deed, and in such a case no tender of the taxes paid was necessary. *Hoffman v. Groll.*..... 652
33. *Evidence; Immaterial Question.* Where the question whether the defendant had an insurance on certain property, or not, arises incidentally in the case, and the plaintiff proves that he had, and the defendant afterward, by his own testimony, shows that he had, it is immaterial whether the evidence showing in the first instance that he had such an insurance is competent, or not. *Reed v. New.*..... 727
- See "ATTACHMENT;" "COMMON LAW," 2, 3; "COURTS;" "CRIMINAL LAW;" "EVIDENCE;" "FINDINGS;" "GARNISHMENT;" "INSTRUCTIONS;" "JUDGMENT;" "PARTITION."

POLICY—SEE "INSURANCE."

POSSESSION:

1. *Unintentional Encroachment; Possession, Not Adverse.* Where the owner of a city lot undertakes to erect a building upon his own ground, but by inadvertence and ignorance of the true line of his lot, places a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterward to claim any portion of such adjoining lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken will not be adverse. *Winn v. Abeles*..... 85
2. *Lateral Support.* While an owner is entitled to claim that his land shall have the lateral support of the soil of the adjoining land, this right is limited to the soil in its natural condition, and does not include anything which may be placed thereon which sensibly increases the burden. *Id* 85
3. *Excavation on Verge of Lot.* The fact that a land-owner has erected a building upon the verge of his lot will not preclude an adjacent lot-owner from excavating to the usual depth, and to the extreme limits of his lot, preparatory to the erection of a building thereon, nor make him liable for any damage thereby occasioned to his neighbor's building, providing the excavation is made with reasonable skill and caution, and with no improper motive. *Id* 85
See "CHATTEL MORTGAGE;" "CONVEYANCE," 4.

POWERS:

National Bank—*Powers Vested in Directors as a Board.* The only powers conferred by statute upon the directors of a national bank are vested in them as a board, and when acting as a unit, and therefore the assent of a majority of the individual members of the board acting separately and singly is not the assent of the bank, and is not binding upon it. *National Bank v. Drake*..... 564

PRACTICE, DISTRICT COURT:

1. A district judge is not competent as a witness in a cause tried before him. *Gray v. Crockett*..... 66
2. *Change of Venue—When Granted, When Not.* A district judge ought not to change the place of trial of a civil action, except for cause, true in fact and sufficient in law, and the cause for such change should be made to clearly appear to the court; but when an affidavit for a change of venue is presented, which is general in its terms, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit and his own personal knowledge that he is so disqualified, cannot be declared erroneous. *Id*..... 66
3. *Venue; Order Granting Change, Not Erroneous.* Where a party to a civil action makes an application to the district court for a change of venue, and files an affidavit in support thereof, upon the ground that he is advised by his attorney that the district judge is a material witness in his behalf upon the trial, that he believes such advice to be true, and desires the evidence of the judge at the trial, and intends to procure the same if a change of venue is granted, and the district court upon such application, affidavit, and its own personal knowledge, transfers the case to another district for trial, the order is not erro-

PRACTICE, DISTRICT COURT—CONTINUED:

- neous; but if the district court, upon such affidavit, so general in its terms, had overruled the application, the supreme court would not disturb the ruling. *Id.*..... 66
4. Criminal case—appeal, when. *The State v. Edwards*..... 105
5. *No Appeal, When.* An appeal will not lie from an order of the district court refusing an application of a defendant charged with a criminal offense, for his discharge, under the provisions of § 221 of the criminal code, where the court remands the defendant into custody until he gives bail, and continues the case against him for trial at the next regular term. *Id.*..... 105
6. *Ejectment; Occupying-Claimant Law; Proceeding in Error; No Estoppel.* Where a defendant who is defeated in an action in the nature of ejectment, after the verdict is rendered, files in the office of the clerk of the district court a written request for the benefit of the occupying-claimant law, and the judgment recites that the defendant has made claim for improvements as an occupying claimant, but such defendant stops with said request, and does not demand a jury for the assessment of his improvements, and excepts to the findings of fact and conclusions of law, and to the judgment rendered, and also obtains time in which to make and serve a case to review the rulings of the trial court, *held*, such defendant is not estopped by the steps so taken by him from instituting and maintaining proceedings in error to reverse the judgment rendered in the action against him. *Mack v. Price*..... 184
7. *Attachment Before Justice; Order not Appealable.* In an action before a justice of the peace an attachment was discharged, and afterward a judgment was rendered in favor of the plaintiff and against the defendant upon the merits, and afterward the plaintiff filed an appeal bond attempting to take an appeal both from the judgment of the justice upon the merits, and from the order of the justice discharging the attachment; and the appeal bond was sufficient for both purposes, if an appeal from an order of a justice of the peace discharging an attachment is allowable under the statutes. In the district court that portion of the appeal which had for its object the giving to the district court power to review and retry the attachment proceedings instituted before the justice of the peace was dismissed. *Held*, Not error; that an order of a justice of the peace discharging an attachment is not appealable. *Roll v. Murray*..... 171
8. *Orders, Not Reviewable.* The denial of a motion by the district court to dismiss an appeal from a justice of the peace, as well as the appointment of a receiver by the district court, are orders which are not reviewable in the supreme court while the action in which they were made is pending in and undisposed of in the district court. *Anderson v. Higgins*..... 201
9. *Argument, Waiver of Right to Make.* Where a case is tried before the court without a jury, and at the close of the evidence the plaintiff's counsel, in the hearing of the court, ask the defendant's counsel whether they desire to argue the case or not, stating that the plaintiff's counsel do not wish to do so, and the defendant's counsel, hearing the same, do not answer, and the court then renders its decision, which is adverse to the defendant, and the defendant's counsel except to the decision,

PRACTICE, DISTRICT COURT—CONTINUED:

- and then ask the court to permit them to argue the case, and the court refuses, *held*, not error; that defendant's counsel, by their silence, waived their right to make an argument at that time or at any time prior to their argument on their motion for a new trial. *Piatt v. Head*..... 282
10. *Occupying-Claimant Law; Review.* The defeated occupant in an action for the recovery of real property is entitled to an investigation of his right under the occupying-claimant law upon a mere request, and error will not lie to the supreme court from a ruling of the district court, causing a journal entry of the request of the claimant to be made, and allowing an investigation of his claim to proceed. *Hazen v. Rounsarille*..... 405
11. *Reviewable Irregularities; Action to Set Aside Sale.* Irregularities affecting a sheriff's sale may be examined in the district court on motion to confirm the sale, or to set aside the sale. Some of such irregularities may also be reexamined in the district court by proceedings under §§ 568 to 580 of the civil code; and all such irregularities, so far as they are shown by the record, may be reexamined on petition in error in the supreme court; and in some particular cases of fraud and irregularity, parties may have an action in the district court in the nature of a suit in equity to set aside a sheriff's sale, and for such other and further relief as justice and equity may authorize. But whatever remedy the aggrieved party may choose, he must resort to the same within proper and reasonable time. *Capital Bank v. Huntoon*..... 577, 578
12. *Entire Judgment, Suspended by Appeal.* The defendant was convicted first before a police judge, and afterward in the district court, for violating an ordinance of a city of the third class, and he then appealed to the supreme court. The sentence was that "he should pay a fine and the costs of suit, and that he stand committed to the jail of the county until the amount of said fine and costs shall be paid." *Held*, That the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court. *City of Millontale v. Lanoue*..... 608
13. *Imprisonment; Order, Not Erroneous.* And further *held*, in such case, that the order of the district court providing for the imprisonment of the defendant in the county jail, which order is in compliance with § 1 of chapter 84 of the Laws of 1879, (Comp. Laws of 1879, ¶ 943,) is not erroneous, notwithstanding § 66 of the act relating to cities of the third class, and notwithstanding the fact that the ordinance provided for imprisonment in the city jail and not in the county jail. *Id.*.... 608
14. *Revision of Sentence.* The district court may, until the term ends, revise, correct or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation. *The State v. Hughes*..... 626
- See "CRIMINAL LAW;" "ORDER OF ARREST."

PRACTICE, SUPREME COURT:

1. *Case-Made; Findings.* Where a case-made shows that all of the evidence offered upon the trial to sustain a particular finding of fact of the trial court is preserved therein, the supreme court

PRACTICE, SUPREME COURT—CONTINUED:

- can decide whether such finding is sustained by any evidence, although all of the evidence presented upon the trial upon other issues of fact is not embraced in the record. *K. C. St. J. & C. B. Rld. Co. v. Gough & Linley*..... 1
2. *Limit of Review in Supreme Court.* Where no case was made for the supreme court, nor any extension of time given for that purpose, within three days after the judgment was rendered, and the case was not brought to the supreme court within one year after the judgment was rendered, the supreme court cannot review such judgment or any ruling involved therein, or made prior thereto, except so far as such judgment or ruling may be involved in some subsequent ruling properly reviewable by the supreme court, as, for instance, a subsequent ruling on a motion for a new trial. *Dyal v. City of Topeka*.... 62
3. *New Trial, No Error in Denying.* And in such a case, where it is not shown that the motion for a new trial was filed within three days after the judgment was rendered, nor shown upon what ground, if any, the motion for a new trial was made, the supreme court cannot say that the court below erred in overruling the motion for a new trial. *Id.*..... 62
4. *Venue; Order Granting Change, Not Erroneous.* Where a party to a civil action makes an application to the district court for a change of venue, and files an affidavit in support thereof, upon the ground that he is advised by his attorney that the district judge is a material witness in his behalf upon the trial, that he believes such advice to be true, and desires the evidence of the judge at the trial, and intends to procure the same if a change of venue is granted, and the district court upon such application, affidavit, and its own personal knowledge, transfers the case to another district for trial, the order is not erroneous; but if the district court, upon such affidavit, so general in its terms, had overruled the application, the supreme court would not disturb the ruling. *Gray v. Crockett*..... 66
5. *Habeas Corpus.* Where a prisoner is held to answer for a criminal offense, and the district court refuses to grant his application for discharge, made by him under the terms of § 221 of the criminal code, and instead thereof remands him to jail until bail is given, the order of the court cannot be reviewed or reversed, or the prisoner discharged, by a proceeding in *habeas corpus* before the supreme court. *In re Edwards, Petitioner*.. 99
6. *Attachment—Waiver of Error in Discharging.* Where a suitor brings to the supreme court for review an order of the district judge at chambers, discharging an attachment that had been obtained at his instance, and, after the petition in error is filed, voluntarily releases the attached property and causes it to be delivered to the adverse party, held, that he thereby acquiesces in and affirms the order complained of, and waives any error that may have been made in discharging the attachment. *Fenlon v. Goodwin*..... 123
7. *Orders, Not Reviewable.* The denial of a motion by the district court to dismiss an appeal from a justice of the peace, as well as the appointment of a receiver by the district court, are orders which are not reviewable in the supreme court while the action in which they were made is pending in and undisposed of in the district court. *Anderson v. Higgins*..... 201

PRACTICE, SUPREME COURT—CONTINUED:

8. *Verdict, Not Set Aside.* Where the evidence is conflicting upon a given subject, but sufficient to sustain the verdict of the jury, the supreme court cannot set aside such verdict. *Ingraham v. Morris*..... 290
9. *Errors of Fact, Seldom Considered.* Questions with regard to the assignments of errors of fact, alleged to have been committed by a justice of the peace, discussed, and held, that such assignments of error can seldom if ever be considered. *Krueger v. Beckham*..... 400
10. *Contributory Negligence; Finding, Sustained.* The jury found as a fact that the plaintiff was not guilty of contributory negligence. Held, That the supreme court cannot say from the evidence and as a matter of law that the finding of the jury is erroneous. *St. L. & S. F. Rty. Co. v. Weaver*..... 412
11. *Negligence; Finding, Sustained.* The jury found as a fact, that the defendant was guilty of negligence in two or more particulars, causing the injuries complained of. Held, That the supreme court cannot, under the evidence and as a matter of law, say that the finding of the jury is erroneous. *Id.*..... 412
12. *Divorce, Procured by Fraud.* Where an action is commenced by a defendant within six months after the rendition of a decree of divorce to vacate the same upon the charge of the fraud of the plaintiff, and in such case a judgment is rendered against the defendant, a subsequent proceeding to review said judgment may be commenced in the supreme court within one year after its rendition. *Haverty v. Haverty*..... 438
13. *Reviewable Irregularities; Action to Set Aside Sale.* Irregularities affecting a sheriff's sale may be examined in the district court on motion to confirm the sale, or to set aside the sale. Some of such irregularities may also be reexamined in the district court by proceedings under §§ 568 to 580 of the civil code; and all such irregularities, so far as they are shown by the record, may be reexamined on petition in error in the supreme court; and in some particular cases of fraud and irregularity, parties may have an action in the district court in the nature of a suit in equity to set aside a sheriff's sale, and for such other and further relief as justice and equity may authorize. But whatever remedy the aggrieved party may choose, he must resort to the same within proper and reasonable time. *Capital Bank v. Huntton*..... 577, 578
14. *Verdict, When Not Set Aside.* Where the testimony offered by the state, when taken alone, is competent and sufficient to sustain the prosecution, a verdict which has been approved by the district court will not be set aside in the supreme court for insufficiency of the evidence. *The State v. Smith*..... 618
15. *Petition in Error, Filed in Time.* Where a petition in error is filed in the supreme court within one year after the making of an order overruling a motion for a new trial, the proceeding is in time for a review of all the rulings of the court made during the trial, and excepted to at the time, which are referred to in such motion. *Bates v. Lyman*..... 634
16. *County-Seat Election; Mandamus; Jurisdiction of Supreme Court.* In an action of mandamus, brought in the supreme court in the name of the state of Kansas, by the attorney general, to

PRACTICE, SUPREME COURT — CONTINUED:

compel the county officers of a certain county to hold their offices at the town of K., which is alleged to be the county seat of the county, *held*, that the supreme court has jurisdiction to hear and determine the case, although in the determination thereof it may be necessary to determine the result of an election held in the county to permanently locate the county seat of such county, and for frauds perpetrated in one of the townships of such county, to wholly ignore the returns from such township and the canvass thereof, and the declaration made by the board of canvassers that a place other than K. had become by such election the permanent county seat of the county. *The State, ex rel., v. Comm'rs of Hamilton Co.* 640

PRESCRIPTION — SEE "HIGHWAY," 4, 5.

PRESUMPTION:

1. *Avoidance of Danger.* A young man of the age of seventeen years and seven months is presumed to have sufficient capacity to be sensible of danger, and to have the power to avoid it; and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age. *Sanborn v. A. T. & S. F. Rld. Co.* 292, 293
2. *Attorney at Law; Authority.* An attorney at law and banker, having claims in his hands for collection, will, where it is necessary to secure the collection of such claims, presumptively have authority to take as collateral security and in his own name a promissory note secured by a chattel mortgage. *Dolan, Sheriff, v. Van Demark.* 304
3. *Record, as Evidence.* A part of a record will generally prove what it purports to prove, but cannot prove more than that, and no liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding deficiencies, or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record. *Capital Bank v. Huntoon.* 580
4. *Land Office; Erroneous Entry, Canceled.* The commissioner of the general land office has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions; and where an erroneous entry made by the register and receiver was canceled by the commissioner, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence. *Darcy v. McCarthy.* 722
5. *Horses — Value — Competent Witness.* Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto. *Reed v. New.* 727
See "STATUTE," 4, 6.

PRINCIPAL AND AGENT — SEE "AGENCY."

PRINCIPAL AND SURETY:

1. *Recognizance—Surety, Liable.* A surety is liable on a forfeited recognizance, although it was signed by him when it was incomplete, where the blanks are afterward filled up and the instrument completed and delivered in his presence and under his direction. *Madden v. The State*. 147
2. *Competent Evidence.* Where a surety claims and testifies that he signed the recognizance only upon the condition that another should join him as co-surety, proof that he was led to sign it by other considerations, such as indemnity furnished or property turned over to him by the prisoner, is not incompetent. *Id* 147
3. *Default of Principal; Inadmissible Evidence.* Proof cannot be offered by the surety that the default of the principal was excused, unless the acts relied on to excuse the default, and which rendered the performance of the condition of the recognizance impossible, have been pleaded by such surety. *Id* 147
See "GARNISHMENT," 3.

PRIVATE INSTRUCTIONS — SEE "AGENCY," 4.

PROBATE JUDGE — SEE "COUNTIES, AND COUNTY OFFICERS," 3;
"OFFICE, AND OFFICER," 1.

PROHIBITORY-LIQUOR LAW — SEE "CRIMINAL LAW," 6, 8, 9,
10, 21, 28, 29.

PROMISSORY NOTE:

1. *Attachment; Note in Settlement of Account.* Where a note is accepted in the settlement of an open account and is taken as absolute payment and extinguishment of the former debt, the fraudulent disposition of a part of his property by the debtor several months prior to the execution of the note, but during the existence of the open account, is not a ground for attachment in an action brought to recover upon the promissory note. *Hershfield v. Lowenthal*. 407
2. *Indorsement, Denied Under Oath; Practice.* In an action brought to recover upon a promissory note payable to order, by a party claiming to be the indorsee, the answer admitted the execution of the note, but denied the written indorsement thereon, by affidavit duly verified: it admitted, however, that the note had been transferred to the plaintiff, and the defense was that the transfer was made after maturity, and that there had been a total failure of consideration for the note. *Held*, The plaintiff is entitled to judgment as being the holder and in possession of the note, unless the defense of the failure of consideration is established; but *held further*, the plaintiff is not protected as a *bona fide* holder of the note so as to cut off the equities of the maker, in the absence of proof of the execution of the written indorsement denied under oath. *Savings Association v. Barber*, 488

PROPOSITION BY LETTER — SEE "CONTRACT," 9, 10, 11.

PUBLICATION NOTICE — SEE "TAXES, AND TAXATION," 11, 18,
14, 16, 21.

PURCHASE OF SCHOOL LAND — SEE "SCHOOL LAND."

Q.

QUESTION OF FACT—SEE "JURY," 4.

QUO WARRANTO—SEE "OFFICE, AND OFFICER," 2.

R.

RAILROADS, AND RAILROAD COMPANIES:

1. *Construction; Bond of Contractor.* Where a railroad company takes from the contractor engaged in the construction of its road a good and sufficient bond, such as is required by chapter 136 of the Laws of 1872, it cannot be held liable for the debts due from the contractor for the labor and material which go into the building of such road. The filing of the bond in the office of the register of deeds is not a condition precedent to immunity from such liability. *Mann v. Burt.* 10
2. *Teamster, a Laborer.* A teamster employed by a contractor in the construction of a railroad is a laborer within the meaning in which that term is used in the statute above mentioned. *Id.*, 10
3. *Company, When Not Liable.* The railroad company cannot be held liable for the debts due from the contractor for the labor of teams in constructing the road, whether such labor was used in connection with the services of the person furnishing the same, or not. *Id.* 10
4. *Teamster and Team—Company not Chargeable.* Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable. *Id.* 10
5. *Stock Law; Confined Animals; Company Liable.* Where the owner of domestic animals in a county where the herd law of 1872 was in force, kept the same confined on his own farm, in a pasture inclosed with a good and lawful fence, and the animals, without fault of the owner, escaped from the pasture in the night-time into a public highway and wandered upon uninclosed lands through which a railway runs, adjoining the farm of their owner, and were run over and killed by an engine at a place on the railway where it was wholly unfenced, and their escape from the pasture was not and could not, by the use of ordinary care, have been discovered by the owner until after they were killed, *held*, that such animals cannot be said to be "allowed to run at large;" and further *held*, that the railway company, under the stock law of 1874, was liable for the value of the animals so killed. *Mo. Pac. Rly. Co. v. Johnston.* 58
6. *Petition to Vote Aid; Duty of County Board.* Where a petition is properly presented to the board of county commissioners of a county, under the provisions of chapter 107, Laws of 1876, and the amendments thereto, to submit to the qualified voters of a township a proposition to subscribe to the capital stock of a railroad company proposing to construct a railroad through or into the township, and upon being examined and canvassed

RAILROADS, AND RAILROAD COMPANIES — CONTINUED:

- by the county commissioners is found to contain the requisite number of legal petitioners, it is the duty of the commissioners to cause an election to be held, as prayed for, to determine whether such subscription shall be made. *The State, ex rel., v. Comm'rs of Rush Co.*..... 150, 151
7. *Limitation of Amount.* Chapter 90, Laws of 1870, does not control or limit the amount of bonds to be voted for under elections granted in accordance with the provisions of chapter 107, Laws of 1876, and the amendments thereto. *Id.*..... 151
8. *Taxes — Equalization — Correcting Assessment.* The county board of equalization is authorized at its meetings held in the month of June of the odd years, when proper notice has been given, to correct and equalize the assessment made in those years under § 69 of the tax law, of real property that has become taxable since the regular assessment of such property in the even years, and therefore at such time the owners of such property have an opportunity for a hearing at which to contest the legality and justice of the assessment. *A. T. & S. F. Rld. Co. v. Wilson, Treas.*..... 175
9. *Passenger on Construction Train ; Reasonable Care.* W., a boy thirteen years of age, asked and obtained leave to ride upon a construction train from the conductor, who had been instructed by the railroad company not to permit passengers to ride on his train, but the instruction had not been communicated to W. The train had a caboose car attached, such as are attached to the freight trains of that road, and upon which passengers are carried. It also appeared that notwithstanding the instruction mentioned, passengers were frequently carried on that and other construction trains. While W. was riding upon the caboose, a collision with another train occurred through the negligence of the railroad company, which resulted in W.'s death. *Held*, That under the circumstances W. was lawfully upon the train, and the company was held to the exercise of reasonable care and diligence toward him. *Id.*..... 185
10. *Implied Authority of Conductor.* It being customary to carry passengers upon the construction trains, persons having no notice of a contrary rule of the company, had a right to assume that the conductor had authority to carry persons on such trains, and that the granting of permission by him fell within his general authority as manager of the train. *Id.*..... 185
11. *Minor Child — Manumission.* In a suit to recover damages for the death of a minor under § 422 of the code, the fact that the parents had released to such minor his time and services during his minority, may properly be considered by the jury in determining the amount of recovery, but it will not prevent the parents from recovering any pecuniary damages, such as the loss of support, that they may be able to prove resulted from his death. *St. J. & W. Rld. Co. v. Wheeler.*..... 185
12. *Corporation — Powers.* A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operations in other states and countries, so long as it does not depart from the terms of the charter under which it was created. *A. T. & S. F. Rld. Co. v. Fletcher.*..... 286

RAILROADS, AND RAILROAD COMPANIES — CONTINUED:

18. *Additional Powers.* Additional powers, auxiliary to the original design or purpose of a corporation, may be conferred thereon by the legislature of the state where the corporation is created. *Id.* 286
14. *Bonds, Binding Guaranty of; Innocent Holder.* Under the provisions of the charter of the Atchison, Topeka & Santa Fé Railroad Company of February 11, 1859, and the terms of the statutes of Kansas, if such company guarantees a bond or other negotiable instrument and takes the same as its own and sells it, its guarantee will be binding upon the company in the hands of an innocent holder for value and without notice of the origin of its title, even if the guarantee of that particular bond, or other negotiable instrument, when made, was *ultra vires* in that special instance. *Id.* 286
15. *Lease by Railway Company of Road of Another Company.* Any railway company organized under the laws of this state may lease the road and appurtenances of any other railway company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease. *Id.* 286
16. *Extension of Railroad by Lease of Other Roads.* Under its charter and the statutes of the state, the Atchison, Topeka & Santa Fé Railroad Company can not only lease a Colorado railroad, but can also lease roads in New Mexico, Arizona, and Old Mexico, if each road so leased thereby becomes, in the operation thereof, a continuation and extension of the road of the Atchison company. *Id.* 286
17. *Authority to Accept Stock and Guarantee Bonds.* Upon the facts disclosed in this case, the Atchison, Topeka & Santa Fé Railroad Company, under its charter and the statutes of the state, had authority to accept the stock of the Sonora Railway Company, of Mexico, and guarantee its mortgage bonds. *Id.* 286
18. *Injunction* — when granted, when not; notice. *Id.* 286, 287
19. *Physician Employed without Authority.* Where a railway passenger train is derailed and some of the passengers are injured by inevitable accident, no obligation rests upon the company to furnish medical care and attention to the injured passengers, and the company cannot be made liable for such care and attention, by the contract of the division superintendent, unless authority has been given him to commit it to such liability; and where a division superintendent employs a physician to attend upon passengers so injured, and the company denies his authority and contests its liability under the employment, it is error for the court to instruct the jury that the division superintendent will be presumed to have such authority until the contrary appears. *U. P. Rly. Co. v. Beatty* 265
20. *Damages; Erroneous Instruction.* In an action against a railroad company to recover for personal injuries, where the plaintiff specifically alleged that the injury was caused by the negligence of his coemployé, the engineer of the train, and no other basis of recovery was stated, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that the plaintiff might recover if the injury was caused by the negligence of the fireman. *A. T. & S. F. Rld. Co. v. Irwin* 286, 287

RAILROADS, AND RAILROAD COMPANIES — CONTINUED:

21. *Railroad Machinery—Company not Culpably Negligent.* Where, in an action against a railroad company to recover damages for personal injury received by an employé in attempting to oil an iron punch driven by iron cog-wheels, which are six or seven feet from the ground or floor of the machine shop, the evidence offered shows that it is not usual to box or fence such machinery, and that the machinery is so arranged with a tight and loose pulley that if a person is going to oil or repair it he can immediately stop the same by simply throwing the belt upon the loose pulley, *held*, that the failure or negligence to box or fence such cog-wheels is not of itself culpable negligence on the part of the company. *Sanborn v. A. T. & S. F. Rld. Co.* 292
22. *Avoidance of Danger; Presumption.* A young man of the age of seventeen years and seven months is presumed to have sufficient capacity to be sensible of danger, and to have the power to avoid it; and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age. *Id.* 292, 298
23. *Stoppage in Transitu.* The vendor's right of stoppage *in transitu* continues not only while the goods are being carried to the point of destination, but also until they have actually reached the possession of the vendee. *Symns & Co. v. Schotten & Co.* ... 310
24. *Implication—Goods in Transit.* Where the goods are removed by the railroad company and placed in its warehouse in its capacity as carrier to await payment of the freight charges and a delivery to the vendee, the implication of the law is, that the goods are still in transit and subject to the vendor's right of stoppage. *Id.* 310
25. *Whistle—Failure to Sound; When Negligence, When Not.* Where a railway company fails to sound the whistle of one of its moving engines, at least eighty rods distant from the place where the engine is to cross a public road or street outside of a city or village, it is negligence toward persons who may be traveling upon that road or street, but is not negligence toward persons who may be traveling on another road or street within the limits of such city or village. *Clark v. Mo. Pac. Rly. Co.* 350
26. *Duty of Person Crossing Track.* Where a person is about to cross a railway track it is his duty to use his senses, and if he does not, and by reason thereof injury results to him from a moving railway train, he cannot recover from the railway company. *Id.* 350
27. *Questions Discussed.* Questions with regard to submitting special questions to the jury, and their findings thereon, and their general verdict, and the judgment of the court upon the special findings, notwithstanding the general verdict, discussed, and *held*, that no material error was committed by the court. *Id.* ... 350
28. *Section Boss and Engineer, Not Co-employés.* A section foreman or section boss in the employment of a railroad company is not a coemployé or fellow-servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of that rule of the common law which exempts the master from liability for negligence between coemployés or fellow-servants. *St. L. & S. F. Rly. Co. v. Weaver* 412

RAILROADS, AND RAILROAD COMPANIES — CONTINUED:

29. *Master — When Liable, When Not.* The question as to when a master at common law is liable and when not liable for negligence between coemployés, discussed. *Id.* 413
30. *Conversation between Civil Engineer and Roadmaster.* Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division roadmaster, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer made in such conversation may be given in evidence as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division. *Id.* 418
31. *Repairs after Accident.* The injuries complained of were caused by the alleged incapacity of a passage-way for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such water-way. *Held*, That this evidence did not of itself prove negligence, nor that the defendant had notice of the insufficiency of the water-way prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but at most it only tended to prove, by way of admission on the part of the defendant, that the water-way was originally too small; and the introduction of such evidence for this purpose was not erroneous. *Id.* 413
32. *Company, to Keep Track and Roadway Safe.* The law does not require that a railroad company shall, as between it and its employés, guarantee the sufficiency, good order and good condition of its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition; and *held*, that the present case was tried upon such theory of the law. *Id.* 414
33. *Company to Make Road Safe.* A railroad company, as between it and its employés, must exercise reasonable and ordinary care and diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same. *Id.* 414
34. *Whistle — Sounding Before Crossing Highway.* It is the duty of a railroad company, in running its trains over its track, to have the whistle of its engines sounded three times, at least eighty rods from the place where the railroad crosses any public highway, except in cities and villages. Where no whistle is sounded, or other alarm given, and damages are sustained by a train of cars running over cattle upon the highway, the company is chargeable with negligence, and it is not relieved from its liability therefor, merely by the evidence of the owner of the cattle, in charge of the same, that he saw the smoke and heard the puffing of the engine drawing the train, more than half a mile from the crossing; because no one is bound to conclude that the engine or train will cross the highway without sounding the whistle three times, at least eighty rods from the crossing. *Mo. Pac. Rly. Co. v. Stevens.* 622

RAILROADS, AND RAILROAD COMPANIES — CONTINUED:

35. *Regular and Extra Trains; Competent Witness.* Where a person has lived several months on a farm, near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one. *Id.*..... 622
36. *Railroad Employé—Two Duties Imposed; Question of Fact.* Where a duty is imposed by a railroad company upon one of its employés, and afterward another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty, is a question of fact to be submitted to the jury upon the evidence, and is not a question of law. *U. P. Rly. Co. v. Fray.*..... 700
37. *Conversation; Incompetent Evidence.* A conversation between two employés of a railroad company concerning a past transaction, is incompetent evidence as against the railroad company to prove such transaction. *Id.*..... 700
38. *Erroneous Instruction.* In an action brought by an employé against a railroad company for injuries resulting from alleged negligence, evidence was introduced tending to show that a duty was imposed by the railroad company upon such employé, and afterward another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time, and evidence was also introduced tending to show that he might have performed both duties by attending to one and then to the other alternately, and that he failed in the performance of one of such duties, and that by reason of such failure the injury for which he sued the railroad company resulted. *Held*, That an instruction by the court to the jury in substance that, if at the time of the injury the plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous. *Id.*..... 700
39. *Erroneous Instruction.* Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that "in case no evidence can be found bearing upon the question required to be answered, the jury will say 'Don't know,' or 'Cannot answer from the evidence.'" *Id.*..... 700
40. *Questions, Not Answered; Error.* And in such a case, where the jury answer eight of such questions by simply saying "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held*, error. *Id.*..... 700
41. *Carrier over Connecting Lines.* While a railroad company cannot be compelled to transport beyond its termini, it is well settled that it may lawfully contract to carry passengers and property over its own and other lines to a destination beyond its own route, and when such a contract is made it assumes all the obligations of a carrier over the connecting lines as well as its own. *A. T. & S. F. Rld. Co. v. Roach.*..... 740

RAILROADS, AND RAILROAD COMPANIES—CONTINUED:

42. *Carriage on Connecting Lines; Loss; Liability.* The sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines the same as on its own. *Id.* 740
43. *Liability of Each Carrier.* Each carrier is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines to whose negligence the loss or injury can be traced, will also be liable to the owner. *Id.* 740
44. *Community of Interest; Last Carrier, When not Liable.* The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination. *Id.* 740

See "ATTORNEY AT LAW," 2.

RAILROAD MACHINERY—SEE "RAILROADS, AND RAILROAD COMPANIES," 21, 22.

RAILROAD STOCK LAW—SEE "RAILROADS, AND RAILROAD COMPANIES," 5, 84, 35.

RAILROAD WHISTLE—SEE "RAILROADS, AND RAILROAD COMPANIES," 25, 26, 27, 34, 35.

RATIFICATION—SEE "BANK."

READING BILLS—SEE "STATUTE," 2, 4, 5.

RECEIPT—SEE "CONTRACT," 12, 13, 14; "EVIDENCE," 15.

RECOGNIZANCE—SEE "PLEADING AND PRACTICE," 7; "PRINCIPAL AND SURETY."

RECORD—SEE "EVIDENCE," 2, 18.

REDEMPTION—SEE "TAXES, AND TAXATION," 16, 19, 23.

REGISTRATION OF VOTERS—SEE "CITIES," 16; "ELECTION," 4.

REIMBURSEMENT—SEE "FRAUD," 8.

REPAIRS AFTER ACCIDENT—SEE "RAILROADS, AND RAILROAD COMPANIES," 31.

REPLEVIN—SEE "DAMAGES," 8.

REPLY—SEE "PLEADING AND PRACTICE," 7.

RESIDENCE—SEE "EXEMPTION."

RESULTING TRUST—SEE "AGENCY," 1.

REVIEW—SEE "PRACTICE, SUPREME COURT," 2, 5, 7, 9, 13, 15.

REVIEWABLE IRREGULARITIES—SEE "SHERIFF'S SALE," 3.

REVISION OF SENTENCE—SEE "CRIMINAL LAW," 38.

ROAD DISTRICT—SEE "HIGHWAY," 3.

ROAD TAX—SEE "CITIES," 16, 17; "CONSTITUTIONAL LAW," 5, 6.

S.

SALE:

1. *Tax Sale, Not Void.* Where the bidders at a tax sale do not bid against each other, but still there was no agreement or understanding between them that would prevent competition or bidding by any person who desired to bid, *held*, that the sale is not void because of any unlawful combination among the bidders. *Davis v. Harrington*..... 196
5. *Fraud; Verdict, Not Set Aside.* Where the good faith and validity of the sale of a stock of millinery by a failing debtor is challenged by the creditors, and it is shown that the vendee, who is a lawyer and real-estate agent residing in a distant city, and unacquainted with the millinery business, purchased all the property of the insolvent vendors for fifty per cent. of the cost-price, without taking an inventory of the same, and it appears that no money was paid by the vendee, but that the sale was made upon a long and unusual credit, the vendee giving his negotiable, unsecured, non-interest-bearing notes, due in six, twelve and eighteen months thereafter; and it is also shown that the sale was hurriedly made, in anticipation that the principal creditors were about to levy upon the goods and enforce the collection of their claims; and it was further shown that the vendors continued in the possession and control of the goods after the alleged sale, claiming to have been employed by the vendee: *Held*, That a verdict based on these facts, finding the sale to be invalid, will not be disturbed. *Roberts v. Radcliff, Sheriff*..... 503
3. *Intent to Hinder and Delay Creditors.* The sale of all the property of an insolvent debtor upon a long and unusual credit, where the necessary effect of which, as well as the intent of the parties, is to hinder and delay creditors in the collection of their claims, will be held void, although there may be an honest intention of the debtor to finally pay his entire indebtedness. *Id.*..... 502
See "FRAUD," 3, 5, 6, 7, 8; "PARTITION;" "SHERIFF'S SALE."

SATISFACTION OF JUDGMENT—SEE "DAMAGES," 7; "JUDGMENT," 7; "PLEADING AND PRACTICE," 13, 14, 15.

SAVING CLAUSE:

Tax Laws; Minor Owner; Redemption. Where certain land was sold for taxes under the tax law of 1868. (Gen. Stat. 1868, ch. 107.) the original owner, who was a minor, had the right to redeem his land from the taxes under such tax law, although before the time given him by such law had expired, and before he at-

SAVING CLAUSE — CONTINUED:

tempted to redeem his land from the taxes, the tax law of 1876 (Laws of 1876, ch. 34; Comp. Laws of 1879, ch. 107) was enacted. The saving clause contained in § 155 of the tax law of 1876 is broad enough in its terms to give him such right to redeem under the tax law of 1868. *Crawford v. Shaft*..... 478

SCHOOL LAND:

1. *No Vested Right, When.* Settlement and improvement upon school lands under the provisions of § 4, art. 14, ch. 122, Laws of 1876, with a view to purchase the same for the appraised value thereof, exclusive of the value of the improvements, do not confer a vested right in the land so settled upon. *The State v. Budgett*..... 600
2. *Inchoate Right, Nature of.* This inchoate right, if the settler be otherwise qualified, gives the occupant a privilege or preference as against the purchase of the land by others, but confers no legal or equitable right against the state. *Id.*..... 600
3. *Compliance with Statute before Purchase.* Where a person, six days before ch. 152, Laws of 1886, was approved, settled upon and improved a quarter-section of school land, by constructing a sod house and breaking five acres, and two months after said chapter 152 took effect, filed his petition setting forth that he had fully complied with the provisions of art. 14, ch. 122, Laws of 1876, and asking under the provisions of that act to purchase at its appraised value, exclusive of the value of the improvements, the land so settled upon by him, *held*, that before the petitioner is entitled to purchase the land at its appraised value, he must comply with all the prerequisites of said ch. 152 — that law being the one in force at the time he presented his petition to the probate court. *Id.*..... 600

SECTION:

The word "section," used in paragraph or subdivision 34 of § 11, article 3, chapter 37, Laws of 1881, is to be construed as meaning "subdivision, or subsection." *In re Dussler, Petitioner*.... 678

SECTION-BOSS — SEE "RAILROADS, AND RAILROAD COMPANIES," 28.

SET-OFF:

1. *Embezzlement; Waiver of Tort.* Where the agent or clerk of a principal is guilty of the embezzlement of his principal's goods, the principal may waive the tort if he chooses, and treat his cause of action against his agent or clerk as one arising upon an implied contract; and if the agent or clerk is the owner of a note executed by the principal, in an action thereon the principal may plead as a set-off to the note the value of his goods embezzled and converted to his own use by his agent or clerk. *Challiss v. Wylie*..... 506
2. *Striking Out, Not Material Error.* An action was brought by the wife of W. upon a promissory note payable to her order. The defendant alleged in his answer that the wife was not the real party in interest, but that the husband furnished the consideration of the note and was the owner thereof, and also alleged a set-off existing in favor of the defendant against the husband for a sum exceeding the amount of the note. Upon motion of the wife, the set-off was stricken out. The other al-

SET-OFF — CONTINUED:

legations in the answer were permitted to stand. The case was tried by the court, without a jury, and the court found that the plaintiff was the real party in interest, and thereon rendered judgment against the defendant. *Held*, That although the district court committed error in striking out the set-off, the error, under the findings, cannot be said to be material, as it did not affect or prejudice in any way the substantial rights of the defendant. *Id.* 506

See "ASSIGNMENT;" "DAMAGES," 2; "PLEADING AND PRACTICE," 5, 6.

SETTLEMENT AND IMPROVEMENT — SEE "SCHOOL LAND."

SETTLEMENT OF DISPUTE — SEE "ARBITRATION."

SEWER TAXES — SEE "CITIES," 10.

SHERIFF — SEE "COUNTIES, AND COUNTY OFFICERS," 4, 5.

SHERIFF'S SALE:

1. *Amendment of Return; Notice; Practice.* In a return made on an execution of a sale of a city lot, the sheriff stated that the property was struck off to F., who refused to pay the amount of his bid, and that the execution was unsatisfied. At the succeeding term of court, H., the execution creditor, made a motion to require the sheriff to amend his return so as to conform to the facts, and to show that the lot was sold to her instead of to F., who was her attorney. The motion was resisted by the sheriff, and made and allowed without notice to the defendant in the execution. The sheriff thereupon amended his return showing a sale of the lot to H., and at the same term of the court the sale was confirmed, following which the sheriff conveyed the lot to the purchaser by a deed. Subsequently the defendant in the execution conveyed the same property to S. *Held*, In an action brought by the grantee of the purchaser at the sheriff's sale to quiet his title to the lot, that the return first made by the sheriff on the execution was not conclusive, and might be amended conformably to the facts upon the application of the purchaser, officer, or either of the parties to the action; and that as the application to amend was made prior to the confirmation of the sale, no new or additional notice to the defendant in the execution was necessary; and *held*, further, that the judgment and execution being valid, the sheriff's deed could not be attacked nor the proceedings impeached, in a collateral action. *Stetson v. Freeman* 523

2. *Irregularities, Cured; Matters, Not Cured.* Mere irregularities in the proceedings connected with a sheriff's sale are cured by the order of the court, made some considerable time afterward, confirming the sale; but matters which are not mere irregularities, or which form no part of the proceedings connected with the sale, as, for instance, fraudulent combinations which might prevent a fair and equitable sale, and matters relating to the ownership of the property sold, are not cured nor finally or conclusively determined by the order confirming the sale. *Capital Bank v. Huntton* 577

3. *Reviewable Irregularities; Action to Set Aside Sale.* Irregularities affecting a sheriff's sale may be examined in the district court on motion to confirm the sale, or to set aside the sale.

SHERIFF'S SALE—CONTINUED:

Some of such irregularities may also be reëxamined in the district court by proceedings under §§ 568 to 580 of the civil code; and all such irregularities, so far as they are shown by the record, may be reëxamined on petition in error in the supreme court; and in some particular cases of fraud and irregularity, parties may have an action in the district court in the nature of a suit in equity to set aside a sheriff's sale, and for such other and further relief as justice and equity may authorize. But whatever remedy the aggrieved party may choose, he must resort to the same within proper and reasonable time. *Id.*..... 577, 578

4. *Agreement to Bid; Sale, Not Set Aside.* Although combinations which might prevent competition at sheriffs' sales are always looked upon by courts with great disfavor, yet where no combination was made except that the several judgment creditors appointed one of their number as agent to attend the sheriff's sale and purchase the property in his own name, and for their benefit, unless it was sold for more than he wished to pay; and there was no agreement, arrangement, or understanding between the judgment creditors that would prevent any one of them, or any other person, from bidding for himself; and the agent appeared at the sale and purchased the property as agreed: *Held*, Under the circumstances of this case, that the aforesaid agreement would not of itself and alone be sufficient to authorize the judgment debtor, more than a year after the sale was made, and several months after it was confirmed, and after the sheriff's deed was executed, and after some of the property had been sold to innocent purchasers, to commence and maintain an action in the nature of a suit in equity to set aside the sheriff's sale. *Id.*..... 578
5. *Old Appraisement; Sale, Not Voidable.* A sale of real estate by a sheriff upon a second offer of sale under an appraisement four years old, is not for this reason alone void, nor is it voidable in this action. *Id.*..... 578
6. *Inadequacy of Price.* Inadequacy of price, taken alone, is seldom, if ever, sufficient to authorize the setting aside of a sheriff's sale; but that ground, with others, is sometimes sufficient. *Id.*..... 578
7. *Void Sale.* Where appraisement has not been waived and real estate is sold at sheriff's sale for less than two-thirds of its appraised value, the sale is void. *Id.*..... 578
8. *Several Judgments; Payment of One before Sale.* Where a sheriff's sale is made to satisfy the judgments of several judgment creditors, and the judgment of one of such creditors has previously been paid, but the amount for which the property was sold is not enough to satisfy the other judgments, *held*, that the fact that one of the judgments had previously been paid, will not of itself render the sale void or voidable; but the judgment creditor whose judgment has been paid should not be allowed to receive any portion of the proceeds of the sale. *Id.*.. 578
9. *Execution; Judgment, When Not Dormant.* Where an action was commenced by a judgment creditor against the judgment debtor to subject certain property to the payment of the debts of such judgment debtor, and another judgment creditor was made a party to the suit within less than five years after such second judgment creditor's judgment was rendered, and in the

SHERIFF'S SALE—CONTINUED:

- above-mentioned action judgment was finally rendered in favor of both the judgment creditors and against the judgment debtor, and an execution was issued thereon within less than five years after this last-mentioned judgment was rendered but more than five years after an execution had been issued in favor of the second judgment creditor on his first judgment, and the property was sold on such execution, *held*, that the judgment of the second judgment creditor is not dormant to the extent of depriving him of participating in the proceeds of the sheriff's sale. *Id.*.....578, 579
10. *Finding, Sustained.* The district court held that still another judgment creditor had the right to participate in the proceeds of the sheriff's sale; and nothing appearing to the contrary, and none of the judgment creditors objecting, such holding must be sustained. *Id.*..... 579
11. *Judgment Creditors—Combination; Setting Aside Sale; Innocent Purchasers.* Where, at a sheriff's sale, the property was sold at only about one-fourth of its actual cash value, and a part of the property was sold in violation of law at less than two-thirds of its appraised value, and the appraisal itself had been made more than four years prior to the sale, and at a time when the price of property was very low, and an agreement was made among the several judgment creditors that one of their number, as their agent, should have authority to purchase the property for them, and he did so purchase the property, which agreement might have induced the other judgment creditors not to bid; and one of the judgments for the payment of which the property was sold had previously been paid: *Held*, That, taking all things together, they are sufficient to authorize the setting aside of the sheriff's sale in an action brought for that purpose, with reference to all lots which still remain in the hands of the judgment creditors and have not been sold or transferred by them to innocent purchasers. *Id.*..... 579
12. *Laches—Sale, When Not Set Aside.* But where the judgment debtor was guilty of *laches* in not resorting to the ordinary remedies to set aside the sale, but waited more than a year after the sale and a long time after the confirmation of the sale, and after the sheriff's deed had been executed, and after some of the property had been sold and conveyed to innocent purchasers, before he commenced any action to question the regularity, validity or fairness of the sale, and then commenced an action in equity to set aside the sale, *held*, that the sale cannot be set aside with regard to the property sold and conveyed to innocent purchasers; and with regard to such property the judgment debtor has no remedy. *Id.*..... 579
13. *Taxes—Condition of Setting Aside Sale.* And where the judgment creditors after the sale paid a large amount of taxes due on the property sold, *held*, that the sale should be set aside only upon the condition that such taxes be paid by the judgment debtor or out of the proceeds of another sale of the property. *Id.*..... 579

SIDEWALK—SEE "CITIES," 5, 6, 7.

SPECIFIC PERFORMANCE—SEE "ACTION," 10; "CONTRACT," 4; "EQUITY," 3; "ESTOPPEL," 2.

STATUTE:

1. *Title to Act.* The title to an act of the legislature reads as follows: "An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings in said counties." The "subject" of this act is the creation and use of a fund to build county buildings, and the body of the act expressly applies to the three counties of Ottawa, Washington, and Republic. *Held*, That the act contains only one subject, which is sufficiently expressed in its title, and is therefore not in conflict with that provision of § 16, article 2 of the constitution which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title." *Weyand v. Stover, Treas.* 545, 546
2. *Reading Bills; Emergency; Journal.* The bill was introduced in the senate and read a first and a second time on the same day, and the senate journal does not show whether a case of emergency existed, or not. *Held*, That, although it is necessary under § 15, article 2 of the constitution that "every bill shall be read on three separate days in each house, unless in case of emergency," yet that each house is the exclusive judge as to when a case of emergency arises or exists; and it is not necessary, in order that the reading of the bill shall be considered valid, that the emergency shall be stated upon the journal. *Id.* 546
3. *Discrepancies; Valid Act.* From the legislative journals it appears that there were several discrepancies or irregularities in the description of the bill and the title to the bill; but, *held*, that the same do not render the act as subsequently passed by the legislature void. *Id.* 546
4. *Presumption.* Nothing appearing showing that the bill was not read section by section on its final passage, as required by § 15, article 2 of the constitution, *held*, that presumptively it was so read. *Id.* 546
5. *Bill, Read Three Times.* Where the house journal shows expressly and affirmatively that the bill was placed upon its third reading, and that afterward it "was read the third time," *held*, that it is sufficiently shown that the bill was read three times in the house. *Id.* 546
6. *Enrolled Statute; Presumption.* The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively and beyond all doubt, that the act was not passed regularly and legally. *Id.* 546

STATUTE OF FRAUDS—SEE "AGENCY," 1; "FRAUD," 1.

STATUTE OF LIMITATIONS—SEE "LIMITATION OF ACTIONS."

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- §§ 60, 61—summons to other county, when; time of service; returnable, when 716

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STOPPAGE IN TRANSITU:

1. The vendor's right of stoppage *in transitu* continues not only while the goods are being carried to the point of destination, but also until they have actually reached the possession of the vendee. *Symms & Co. v. Schotten & Co.*..... 310
2. *Implication—Goods in Transit.* Where the goods are removed by the railroad company and placed in its warehouse in its capacity as carrier to await payment of the freight charges and a delivery to the vendee, the implication of the law is, that the goods are still in transit and subject to the vendor's right of stoppage. *Id.*..... 310

STREET LABOR—SEE "CITIES," 16.

STREET RAILROAD—SEE "CITIES," 1, 2, 3.

SUB-SECTION—SEE "SECTION."

SUBROGATION:

1. *Stranger Paying Debt.* Where a stranger, a mere volunteer, a mere intermeddler, pays the debt of another, he cannot be subrogated to the rights of the creditor. *Crippen v. Chappel*. . . . 495
2. *Request to Pay; Mortgage.* But where a person pays a debt, which is secured by a mortgage, at the instance and request of the debtor, with the agreement that the person paying the debt shall have a mortgage lien upon the real estate then mortgaged to secure such debt, and a new mortgage is given but is void, the party furnishing the money may be subrogated to the rights of the original creditor. *Id.* 495
3. *Administrator; Mortgage.* And this rule applies where an administrator borrows money to pay a debt of his intestate's estate. In other words, where a debt is due against the estate of a deceased person, and such debt is secured by a mortgage on the real estate of such deceased person, and the administrator whose duty it is to pay such debt borrows the money therefor from a third person, with the agreement and understanding between them that such third person shall be reimbursed from the assets of the estate, and such third person shall be secured by a mortgage lien upon the previously-mortgaged property of such estate, and for that purpose a mortgage on the previously-mortgaged property is executed by the administrator to such third person, which mortgage is void because of a want of power in the administrator to execute the same, but in pursuance of such mortgage and with the agreement and understanding between the administrator and the loaner of the money, the money is loaned and is paid to the original mortgagee, *held*, that such third person may then be subrogated to the rights of the original mortgagee. *Id.* 495

SUMMONS—SEE "JUSTICES, AND JUSTICES' COURTS," 4, 5.

SUPERINTENDENT OF INSURANCE—SEE "INSURANCE," 1, 2.

SURETY—SEE "PRINCIPAL AND SURETY,"

SUSPENSION OF JUDGMENT—SEE "CRIMINAL LAW," 28, 29.

T.

TAXES, AND TAXATION:

1. *Street Railroad; Regulation by City; License Tax.* A city granted to a corporation a franchise to construct and operate a street railroad within its limits, and in the ordinance conferring the grant provided how and when it should be constructed, and the manner in which it should be maintained. *Held*, That the grant thus made will not exempt the corporation from reasonable regulation by the city in the operation of the road, nor will it prevent the city from levying and collecting a license tax thereon. *City of Wyandotte v. Corrigan*. 21
2. *Grants to Corporations; Strict Construction.* Grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public. *Id.* 21

TAXES, AND TAXATION — CONTINUED:

3. *Agent Violating City Ordinance.* An agent or employé of such corporation who knowingly operates or assists in operating a street railway when the license tax imposed on such business is unpaid, will be liable to prosecution and punishment, as prescribed by the ordinance. *Id.*..... 21
4. *Land, Divided; Parts Taxed Separately; Valid Tax Deed.* A quarter-section of land may be divided into eighty-acre tracts and assessed and taxed separately; and this may be done in some cases although the property may belong to one individual; and where a quarter-section is so assessed and taxed, it will be presumed, in the absence of anything to the contrary, that the officers did their duty; and a tax deed founded upon such assessment and taxation will be held to be valid, where nothing else appears that would render it invalid. *Spalding v. Watson*..... 39
5. *Tax Deed, Not Absolutely Void; Statute of Limitations.* Where a person owns a tax-sale certificate and is entitled to have a valid tax deed executed thereon, but such person is at the time the county clerk of the county in which the tax deed is to be executed, and such person as county clerk executes the tax deed to himself as an individual, and the tax deed is immediately recorded, *held*, that it is not absolutely void, and that after the statute of limitations relating to tax deeds has completely run in its favor, it will be valid and not even voidable. *Barr v. Randall*..... 126
6. *Tax Deed, Valid on Face.* A tax deed that is substantially in the form prescribed by the statute is valid on its face, although immaterial words of the statutory form are omitted, if everything of substance required by the statute as to form is found in the deed, when all of the recitations of the deed are taken together and so considered. *Mack v. Price*..... 134
7. *Tax Deed — Words Properly Omitted.* Where a tax deed recites that no person offered to pay the taxes, interest and costs (naming the amount) then due and remaining unpaid on certain lots, (describing the same,) nor any part or parcel thereof, and that the whole of said real estate was bid off by the county treasurer for the county for the amount of taxes, penalty and charges, and that subsequently, upon a date named, the county clerk of the county duly assigned the certificate of sale of said real estate, and all the right, title and interest of the county therein and to said property, to one M., *held*, that the words "was the least quantity bid for" were properly omitted from the tax deed, as the county is not a voluntary or a competitive bidder. *Id.*..... 135
8. *Equalization — Correcting Assessment.* The county board of equalization is authorized at its meetings held in the month of June of the odd years, when proper notice has been given, to correct and equalize the assessment made in those years under § 69 of the tax law, of real property that has become taxable since the regular assessment of such property in the even years, and therefore at such time the owners of such property have an opportunity for a hearing at which to contest the legality and justice of the assessment. *A. T. & S. F. Rld. Co. v. Wilson, Treas.*..... 175

TAXES, AND TAXATION—CONTINUED:

9. *Tax Deed, Sufficient.* Where a tax deed follows the statutory form, and states that the land was sold by the county treasurer at a sale begun and publicly held "at the county seat of said county," and does not state that the land was sold "at public auction at his office," but the sale was in fact at public auction at the treasurer's office, *held*, that the tax deed, unless void for some other reason, is sufficient. *Davis v. Harrington*... 196
10. *Tax Sale, Not Void.* Where the bidders at a tax sale do not bid against each other, but still there was no agreement or understanding between them that would prevent competition or bidding by any person who desired to bid, *held*, that the sale is not void because of any unlawful combination among the bidders. *Id.*..... 196
11. *Loss of Notice and Proof.* Where notice of the tax sale was properly given and proper proof thereof made, and the notice and proof were properly filed as required by law, but such notice and proof were afterward lost or destroyed and were not on file in the proper office, *held*, that such loss or destruction does not render the tax sale void. *Id.*..... 196
12. *Tax Deed; Error as to Amount of Consideration.* Where the county clerk, in executing a tax deed, inserts as the consideration for the deed the amount of the taxes paid by the holder of the tax title and his assignor, without adding any interest or costs, as he should do, and such error is shown by the tax deed itself, and the redemption notice showed "the amount of taxes charged and interest calculated to the last day of redemption," which of course was a larger amount than the amount inserted in the tax deed as the consideration therefor, *held*, that such error of the county clerk with respect to the amount of the consideration for the tax deed does not render the tax deed void. *Id.*..... 196
13. *Irregularity in Tax List and Publication Notice.* Where a tax list and the accompanying notice for publication are not made out by the county treasurer between the first and tenth of July, as required by § 106 of chapter 107, Comp. Laws of 1879, but are made out in ample time for the list and accompanying notice to be published as prescribed by § 107 of said chapter 107, the delay is a mere irregularity only, and is fully cured by the provisions of § 139 of said chapter 107. *Stout v. Coates, Assignee*..... 382
14. *Irregularity; Affidavit of Publication.* Where a tax list and accompanying notice are properly published for the requisite length of time required by the statute, and the printer publishing the list and notice makes an affidavit thereof, as prescribed by § 108 of said chapter 107, and such affidavit is filed with the county clerk, to be preserved by him, the failure or omission of the county treasurer to make another affidavit of the printing of the list and notice, in accordance with the provisions of said § 108, is only an irregularity, and will not affect fatally the tax proceedings. *Id.*..... 382
15. *Tax-Sale Certificate; Recital.* A recitation in a tax-sale certificate that a deed of the premises therein described will be due to the purchaser a day or two too soon, will not invalidate a tax deed issued upon the tax sale, if all the other tax proceedings are regular, and if three years have fully expired from the day of sale before the issuance of the tax deed. *Id.*..... 382

TAXES. AND TAXATION -- CONTINUED:

16. *Redemption List, Not Posted; Tax Deed.* The posting up of the redemption list and notice required by the provisions of § 187 of said chapter 107 cannot be omitted, and if omitted, the failure to comply with the provisions of the statute in that regard will be fatal to the tax deed, if challenged before the statute of limitations has full operation thereon. *Id.* 382
17. *Improper Tax Sale; Injunction; Insufficient Tender of Taxes.* Where two lots of land were assessed in 1880 for taxation, separately, and at different valuations, and were advertised in the same manner, but were not offered separately at the tax sale, but instead thereof were improperly sold as one tract only, and subsequently the owner of the lots brings an action to enjoin the issuance of a tax deed on account of the irregular sale, *held*, that before he is entitled to the injunction prayed for, he must pay or tender the full amount of taxes and charges, with interest thereon at the rate of twenty-four per cent. per annum. (Comp. Laws of 1879, ch. 107, § 127.) *Held, further*, That the owner of the lots so sold for taxes cannot redeem his lots or enjoin the issuance of a tax deed on the tax sale by tendering the taxes and charges with only ten per cent. interest thereon, even if he first calls the attention of the board of county commissioners of his county to the error or irregularity existing in the tax sale, and applies to the board for an order directing the county clerk not to convey the lots if such application is refused by the board and no order made concerning the return of the tax certificate, or the setting of the same aside. *Miller v. Madden.* 455
18. *General Assignment; Mistake; Notice; Tax Sale; Possession.* One P., residing in Indiana, was the owner of certain lots in the city of Topeka, in this state. Under the laws of Indiana, he executed a deed of assignment of certain real and personal property to one B., in trust for his creditors. He intended to convey thereby all of his real and personal property, and among other real estate, the lots owned by him in Topeka, but by mistake of the scrivener who prepared the deed, other lots in the city of Topeka, to which P. had no title, were inserted, and the lots intended to be conveyed were wholly omitted therefrom. The property transferred by P. to his assignee failed to pay the debts of his creditors, only fifty cents being realized by them on the dollar. Subsequently, P. conveyed the lots in Topeka, the title to which was in his name, to R., by quitclaim deed. Prior to this conveyance the deed of assignment had never been recorded in the office of the register of deeds of Shawnee county, in this state, nor any steps taken to correct the misdescription in the deed, or subject the lots to the possession of P.'s assignee. R. had no actual notice of the deed of assignment before his purchase. *Held*, That as between R. and one H., in possession of the lots under a tax deed founded upon an invalid tax sale, that R., as the holder of the legal title to the premises, is entitled to possession thereof, subject to H.'s lien for taxes, interest, and costs, and his rights as an occupying claimant. *Hentig v. Redden.* 471
19. *Minor Owner; Redemption; Saving Clause.* Where certain land was sold for taxes under the tax law of 1868, (Gen. Stat. 1868, ch. 107.) the original owner, who was a minor, had the right to redeem his land from the taxes under such tax law, although before the time given him by such law had expired, and before

TAXES, AND TAXATION—CONTINUED:

- he attempted to redeem his land from the taxes, the tax law of 1876 (Laws of 1876, ch. 34; Comp. Laws of 1879, ch. 107) was enacted. The saving clause contained in § 155 of the tax law of 1876 is broad enough in its terms to give him such right to redeem under the tax law of 1868. *Crawford v. Shaft*. 478
20. *Sewer Taxes; Apportionment.* Where sewer taxes in a city are levied in accordance with the value of the lots without the improvements thereon, *held*, that such rule of apportionment of the taxes is valid. *Mason v. Spencer, County Clerk*. 512
21. *Tax Sale; Defective Notice; Voidable Deed.* A tax-sale certificate and tax deed assigned and issued under the provisions of chapter 43, Laws of 1879, depend for their validity upon the regularity of the anterior tax proceedings, and upon the sale which was made when the land was bid in by the county; and the omission to state in the notice of such sale that the land would be sold at public auction, is a defect which renders the tax deed voidable. *Hoffman v. Groll*. 652
22. *Mortgage; Foreclosure; Testing Tax Deed.* When a tax deed is set up in an action to foreclose a mortgage with a view of extinguishing the mortgage lien, the mortgagee has a right to question and have settled the validity of the tax deed, and in such a case no tender of the taxes paid was necessary. *Id.* . . . 652
23. *Invalid Tax Deed; Amount of Recovery by Holder.* Where such a tax deed is held to be invalid, the holder can only recover the reduced amount actually paid by him under the order of the county commissioners upon the tax-sale certificate, together with the interest thereon, instead of the full amount of taxes, interest and penalties, which were legally charged against the land. *Id.* 652
24. *Interest.* When a tax deed has been adjudged invalid, the holder can only recover interest on the amount found due for taxes at the rate of seven per cent. per annum from the date of the judgment. *Id.* 652
25. *Street Labor, Not a Tax on Right to Vote.* The satisfaction of an assessment or levy of labor to keep the streets in repair in cities of the first class, is not a prerequisite of registration, and in no sense can it be said that said assessment or levy is a tax, or an embargo upon the right to vote, although the list of registration is one of the methods of ascertaining who are liable to work upon the streets. *In re Dassler, Petitioner*. 678
- See "MORTGAGE," 4; "SHERIFF'S SALE," 18.

TAX DEED—SEE "TAXES, AND TAXATION," 4, 5, 6, 7, 9, 12, 16, 18, 21, 22, 23, 24.

TAX LIST—SEE "TAXES, AND TAXATION," 13, 14, 15, 16.

TAX SALE—SEE TAXES, AND TAXATION," 10, 11, 17, 18, 19, 21.

TAX-SALE CERTIFICATE—SEE "TAXES, AND TAXATION," 15, 21.

TEAMSTER—SEE "RAILROADS, AND RAILROAD COMPANIES, 2, 3, 4.

TENDER—SEE "AGENCY," 1; "CONTRACT," 15; "TAXES, AND TAXATION," 17.

TITLE—SEE "EQUITY," 1, 2; "ESTOPPEL," 1, 2; "FRAUD," 1, 2, 7; "HOMESTEAD;" "POSSESSION."

TITLE OF ACT—SEE "STATUTE," 1.

U.

UNDERTAKING—SEE "INJUNCTION," 1.

UNINTENTIONAL ENCROACHMENT—SEE "POSSESSION," 1.

UNITED STATES LAND OFFICE—SEE "OFFICE, AND OFFICER," 3, 4.

V.

VENDOR AND VENDEE—SEE "FRAUD," 3, 5, 6, 7, 8; "STOPPAGE IN TRANSITU."

VENUE—SEE "PRACTICE, DISTRICT COURT," 2, 3.

VERDICT—SEE "CRIMINAL LAW," 12, 31; "FRAUD," 5; "PRACTICE, SUPREME COURT," 8, 14.

VERIFICATION—SEE "INFORMATION."

VESTED RIGHTS—SEE "SCHOOL LAND."

W.

WAIVER:

1. *Information—Waiver of Defects.* Where a criminal warrant is issued upon an information charging the defendant with selling intoxicating liquors in violation of law, and the defendant, without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, enters into a recognizance for his appearance at the next term of the court, and is thereby discharged from arrest, he waives any supposed defects or irregularities in the issuing of the warrant without a sufficient verification of the information, and cannot afterward for that reason and upon motion have the warrant quashed or set aside. *The State v. Longton*..... 1375
2. *Confession of Judgment.* Where a justice of the peace left his office and went to the defendant's residence, which was in the same township, and there the defendant waived summons, confessed judgment, and swore to the necessary affidavit therefor, and the justice then returned to his office, where he made the proper entries of the proceedings, held, that such judgment is neither void nor voidable; that the defendant, when she waived the summons, confessed the judgment, etc., waived the irregularity of the justice's taking the confession of the judgment at a place other than his office. *Krueger v. Beckham*, 400
See "PLEADING AND PRACTICE," 10, 26.

WAIVER OF ERROR—SEE "PRACTICE, SUPREME COURT," 6.

WAIVER OF TORT—SEE "PLEADING AND PRACTICE," 26, 27.

WARD—SEE "GUARDIAN AND WARD."

WITNESS:

1. A district judge is not competent as a witness in a cause tried before him. *Gray v. Crockett*..... 66
 2. *Changing Testimony*. When the witness admits that the testimony which she formerly gave in the case was untrue, and then proceeds to state what she claims is a correct relation of the facts, full inquiry should be allowed with respect to what led her to make the so-called untrue statements, as well as the influences which subsequently caused her to change her testimony; but where such witness has quite fully stated what was said and done by those who were urging her to return to the witness stand and tell the truth, the refusal of the question as to what she was crying about in their presence, is not such an error as will work a reversal of the judgment. *The State v. Miller*..... 328
 3. *Impeachment of Party's Own Witness*. The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and although the court may have committed slight error in the present case in permitting such an impeachment, yet under the circumstances of the case the supreme court cannot say that any material error was committed. *St. L. & S. F. Rly. Co. v. Weaver*.. 418
 4. *Regular and Extra Trains; Competent Witness*. Where a person has lived several months on a farm, near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one. *Mo. Pac. Rly. Co. v. Stevens*..... 622
 5. *Horses—Value—Competent Witness*. Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto. *Reed v. New*..... 727
- See "CRIMINAL LAW," 6, 9, 13, 15, 33.

Ex. J. A. A.



